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RECORD, CASE No. 14,334.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 293.

THE BRITISH STEAMSHIP "MARTELLO," &c.; CHARLES HENRY WILSON AND ARTHUR WILSON, CLAIMANTS, APPELLANTS,

vs.

ICHABOD WILLEY AND WILLIAM H. PARSONS ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1890.

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INDEX.

	Original.	Print.
Bill of exceptions	1	1
Libel and complaint of Ichabod Willey	2	1
Stipulation that libel of Wilson stand as answer	5	3
Libel and complaint of Chas. Henry Wilson *et al.*	5	3
Stipulation that libel of Willey stand as answer	9	5
Evidence on behalf of the "Martello"	10	6
Testimony of Francis Eldon Jenkins	10	6
Charles Billington	10	6
Reginald Horncastle	11	6
Joseph Henderson	11	7
John Maider	12	7
Reginald Horncastle	14	8
William Germond	14	8
Joseph Henderson	14	9
Francis Eldon Jenkins	16	9
Arthur Bradley Stout	16	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 27, 1893.

	Original.	Print.
Testimony of Charles Billington	17	10
James Ogden	17	10
John C. Wolff	18	10
Evidence on behalf of Willey	19	11
Testimony of Ichabod Willey	19	11
Mikal Ludvigsen	19	11
John Burns	20	12
Charles Cobb	20	12
Evidence on behalf of the "Martello"	21	12
Testimony of Francis Eldon Jenkins	21	13
Charles Billington	24	15
James Ogden	25	15
Reginald Horncastle	26	15
Arthur B. Stout	29	18
John C. Wolff	30	18
Evidence on behalf of Willey	31	19
Testimony of Charles Cobb	31	19
Johann Mathlin	32	19
Mikal Ludvigsen	32	19
Joseph Frates	32	19
Joseph Green	33	20
John Burn	33	20
Frank Eustice	33	20
Ichabod Willey	33	20
Michael W. Crowell	33	20
Albert Spencer	34	20
Francis Martin	34	20
Charles W. Kennedy	34	21
Evidence on behalf of the "Martello"	35	21
Testimony of Francis Eldon Jenkins	35	21
Charles Billington	35	21
James Ogden	36	22
Walter Wellsman Tucker	36	22
Evidence on behalf of Willey	37	22
Testimony of Charles Cobb	37	22
Mikal Ludvigsen	37	22
Ichabod Willey	37	23
Evidence on behalf of the "Martello"	42	26
Testimony of Francis Eldon Jenkins	42	26
Charles Billington	42	26
James Ogden	43	26
Walter Wellsman Tucker	43	26
Reginald Horncastle	43	27
Evidence on behalf of Willey	44	27
Testimony of Mikal Ludvigsen	44	27
Charles Cobb	44	27
Mikal Ludvigsen	45	28
Johann Mathlin	46	28
Ichabod Willey	46	28
Evidence on behalf of the "Martello"	47	29
Testimony of Francis Eldon Jenkins	47	29
Charles Billington	47	29
James Ogden	47	29

	Original.	Print.
Testimony of Walter Wellsman Tucker	48	29
Reginald Horncastle	48	30
Arthur Bradley Stout	48	30
John C. Wolff	48	30
Francis Eldon Jenkins	49	31
Charles Billington	50	31
James Ogden	50	31
Reginald Horncastle	50	31
Evidence on behalf of Willey	50	31
Testimony of Ichabod Willey	50	32
Charles Cobb	53	33
Evidence on behalf of the "Martello"	54	33
Testimony of Francis Eldon Jenkins	54	33
Charles Billington	54	34
Evidence in behalf of Willey	55	34
Testimony of Ichabod Willey	55	34
John Burns	59	36
Evidence in behalf of the "Martello"	59	36
Testimony of Charles Billington	59	36
Evidence in behalf of Willey	60	37
Testimony of Ichabod Willey	60	37
Evidence in behalf of the "Martello"	68	41
Testimony of Francis Eldon Jenkins	68	41
Charles Billington	68	41
Reginald Horncastle	69	42
James Ogden	69	42
Evidence in behalf of Willey	71	43
Testimony of Daniel A. Nash	71	43
Evidence in behalf of the "Martello"	72	43
Testimony of Joseph Henderson	72	43
Francis Eldon Jenkins	72	44
William Germond	73	44
Joseph Henderson	73	44
William Wood	74	45
William Germond	75	45
Joseph Henderson	76	45
Reginald Horncastle	76	46
Evidence in behalf of Willey	78	46
Testimony of Ichabod Willey	78	46
Evidence in behalf of the "Martello"	81	48
Testimony of Francis Eldon Jenkins	81	48
Reginald Horncastle	81	48
John Maider	82	49
Charles Billington	82	49
Francis Eldon Jenkins	83	50
John Maider	84	50
Robert J. Nicholson	84	50
John Maider	84	50
Robert J. Nicholson	85	51
Francis Eldon Jenkins	85	51
Charles Billington	86	51
James Ogden	86	51
Reginald Horncastle	86	52

	Original.	Print.
Evidence in behalf of Willey	87	52
Testimony of Ichabod Willey	87	52
Evidence in behalf of the "Martello"	89	53
Testimony of Francis Eldon Jenkins	89	53
John Wolff	89	53
Evidence in behalf of Willey	91	55
Testimony of Ichabod Willey	91	55
Evidence in behalf of the "Martello"	92	55
Testimony of John C. Wolff	92	55
Evidence in behalf of Willey	93	55
Testimony of Ichabod Willey	93	56
Evidence in behalf of the "Martello"	96	57
Testimony of Francis Eldon Jenkins	96	57
Charles Billington	96	57
James Ogden	96	57
Reginald Horncastle	97	58
Evidence in behalf of Willey	97	58
Testimony of Ichabod Willey	97	58
Evidence in behalf of the "Martello"	100	59
Testimony of Francis Eldon Jenkins	100	59
Reginald Horncastle	100	60
Francis Eldon Jenkins	101	60
Alfred R. Wolff	101	60
Evidence in behalf of Willey	109	64
Testimony of Charles Cobb	109	64
Mikal Ludvigsen	109	64
Johann Mathlin	110	65
Joseph Trater	110	65
Joseph Green	110	65
Martin Anderson	111	66
Ichabod Willey	111	66
Evidence in behalf of the "Martello"	114	68
Testimony of Charles Billington	114	68
Francis Eldon Jenkins	115	68
John Maider	115	68
Robert J. Nicholson	116	69
Francis Eldon Jenkins	116	69
Charles Billington	117	69
James Ogden	117	69
Francis Eldon Jenkins	118	70
John Maider	119	71
Robert J. Nicholson	119	71
Reginald Horncastle	119	71
Arthur Bradley Stout	120	71
Francis Eldon Jenkins	120	72
Charles Billington	121	72
John Maider	121	72
Robert J. Nicholson	122	73
Reginald Horncastle	123	73
Francis Eldon Jenkins	124	74
Charles Billington	124	74
Reginald Horncastle	125	75
Arthur Bradley Stout	125	75

	Original.	Print.
Evidence in behalf of Willey	126	76
Testimony of Ichabod Willey	126	76
Evidence in behalf of the "Martello"	130	78
Testimony of Francis Eldon Jenkins	130	78
Evidence in behalf of Willey	131	78
Testimony of Ichabod Willey	131	78
Stipulation as to use of testimony	131	79
Findings requested by the "Martello"	132	79
Conclusions requested by the "Martello"	135	80
Findings of fact	135	81
Conclusions of law	140	83
Opinion of Judge Lacombe	140	83
Additional findings requested by the "Martello"	144	85
Additional conclusions requested by the "Martello"	157	90
Order refusing additional findings, &c.	158	90
Additional findings requested by the "Martello"	158	90
Additional conclusions requested by the "Martello"	159	91
Exceptions to findings on behalf of the "Martello"	160	91
Judge's certificate to bill of exceptions	188	105
Consent to filing bill of exceptions	189	106
Interlocutory decree of district court in Willey *vs.* "Martello"	190	106
Wilson *vs.* Willey	191	106
Final decree of district court in Willey *vs.* "Martello"	192	107
Wilson *vs.* Willey	193	107
Notice of appeal to circuit court in Willey *vs.* "Martello"	196	109
Wilson *vs.* Willey	197	109
Willey *vs.* "Martello"	198	109
Wilson *vs.* Willey	199	110
Petition of appeal in Willey *vs.* "Martello"	200	110
Wilson *vs.* Willey	203	112
Willey *vs.* "Martello"	206	113
Wilson *vs.* Willey	209	115
Opinion of Judge Brown	213	117
Final decree of circuit court in Wilson *vs.* Willey	225	123
Willey *vs.* "Martello"	227	124
Petition of appeal in Wilson *vs.* Willey	230	125
Willey *vs.* "Martello"	234	127
Appeal bond	238	128
Citation (copy)	242	130
Clerk's certificate	244	130

1 In the Circuit Court of the United States for the Southern District of New York.

ICHABOD WILLEY, Libellant and Appellant,
v.
THE BRITISH STEAMSHIP MARTELLO, etc.; CHARLES HENRY WILSON *et al.*, Claimants, Respondents, and Appellees.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants and Appellants,
v.
THE BARKENTINE FREDA A. WILLEY, etc.; WILLIAM H. PARSONS *et al.*, Claimants, Respondents, and Appellees. (Cross-libel.)

Bill of Exceptions.

The above-entitled cross-causes came on for trial at the city of New York before the Honorable E. Henry Lacombe, circuit judge, presiding, at a term of the circuit court of the United States for the southern district of New York, in the second circuit, on the third day of June, 1889, on the appeal of the libellant in the cause first above entitled from the final decree of the district court of the United States for the southern district of New York, made and entered therein on the nineteenth day of December, 1888, and on the appeal by the libellants, Charles Henry Wilson and Arthur
2 Wilson, in the cause secondly above entitled from the final decree of the district court of the United States, made and entered therein on the said nineteenth day of December, 1888.

The counsel for the libellant, Ichabod Willey, read the libel filed by said libellant, as master of the barkentine Freda A. Willey and owner of the cargo laden aboard *aboard* said barkentine, *in rem* against the British steamship Martello, her engines, etc., in a cause of collision, civil and maritime, as contained in the apostles transmitted from the district court, as follows:

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of Ichabod Willey, master of the barkentine Freda A. Willey and owner of the cargo laden aboard said barkentine, against the British steamship Martello, her boilers, engines, tackle, apparel, and furniture, in a cause of collision, civil and maritime, alleges as follows:

First. That the said steamship is now within the district and within the admiralty and maritime jurisdiction of the United States of this honorable court.

Second. That the libellant is the master of said barkentine Freda A. Willey and owner of the cargo laden on board thereof.

Third. That on the twenty-fourth day of April, 1887, the said

barkentine left Pensacola with a full cargo of yellow-pine lumber aboard, bound for New Haven; that said vessel was in every way strong, tight, staunch, and seaworthy and had a competent crew aboard.

3 Fourth. That on the eighth day of May inst., while on said voyage, there being a skillful and competent man at the wheel, and also a competent man on the lookout, and the mate, an able seaman, and libellant on deck, at about eight o'clock in the morning, the wind blowing about east by north and blowing about a four-knot breeze, the said barkentine being about two miles to the northward and eastward of the Sandy Hook light-ship and heading about north, and on the starboard tack, the weather being somewhat foggy, the lookout on said barkentine reported a steamer on the port bow; that said steamer was visible at that time, about a quarter of a mile away; that a fog-horn had been and then was blowing on said barkentine one blast at intervals of less than two minutes, the same having been blown by libellant himself from the time the steamer was seen; that from the time said steamer was reported up to the time of the collision the said barkentine held her course, as she was bound to do. The said steamer did not change her course or keep out of the way of said barkentine, but ran into said barkentine, striking her on the port bow just forward of the cathead, cutting into her amidships, causing her to sink, so that the full extent of the damage to said vessel and cargo cannot now be ascertained, but the amount thereof, with damages for detention while the vessel is repairing, will exceed fifteen thousand dollars, as libellant verily believes.

Fifth. That the said collision was occasioned by the negligence and unskillfulness of those navigating said steamship, in

4 that, among other things, said steamer was going at too high a rate of speed in a fog; that she did not have a proper lookout, and in that she did not see said barkentine in time, and in that she did not keep out of the way of said barkentine.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form of law, according to the course and practice of this honorable court in causes of admiralty jurisdiction, may issue against said vessel, her tackle, apparel, and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that said vessel may be condemned and sold and the libellant paid his aforesaid claim, with interest and costs, and may have such other and further relief as to the court shall seem meet.

ICHABOD WILLEY.

Sworn to before me this 12th day of May, 1887.

FRED'K GIBLIN,
Notary Public, Kings County. [L. S.]

Certificate filed in New York county.

GOODRICH, DEADY & GOODRICH,
Libellants' Proctors, 59 Wall Street, New York.

WM. W. GOODRICH, *Adv.*

The counsel for the claimants, Charles Henry Wilson and Arthur Wilson, then read the stipulation that the libel filed by said claimants in their cross-action against the barkentine stand as the answer of said claimants in this cause, as follows:

District Court of the United States, Southern District of New York.

ICHABOD WILLEY
v.
THE STEAMSHIP MARTELLO.

It is hereby consented that the libel filed by Charles Henry Wilson and Arthur Wilson against the barkentine Freda A. Willey, &c., stand and be considered as the answer of the claimants in this cause.

Dated August 3, 1887.

GOODRICH, DEADY & GOODRICH,
Proctors for Libellants.
FOSTER & THOMSON,
Proctors for C. H. & A. Wilson.

The counsel for said Charles Henry Wilson and Arthur Wilson also read the libel filed by them as owners of the British steamship Martello, &c., on the twenty-fifth day of May, 1887, *in rem* against the barkentine F-eda A. Willey, her tackle, apparel, and furniture, in a cause of collision, civil and maritime, as contained in the apostles transmitted from the district court, as follows:

To the Hon. Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of Charles Henry Wilson and Arthur Wilson, of Hull, England, composing the firm of Thomas Wilson, Sons and Company, of said Hull, against the barkentine Freda A. Willey, her tackle, apparel, and furniture, and all persons intervening for their interest therein, in a cause of collision, civil and maritime, alleges and articulately propounds as follows:

First. At all the times hereinafter mentioned the libellants were and still are the owners of the British steamship Martello, her boilers, engines, tackle, apparel, and furniture.

Second. On or about the 7th day of May, 1887, the said steamship Martello left the port of New York with a full cargo, bound for Hull. Said vessel was in every respect tight, staunch, strong, and seaworthy and had a full and competent crew on board.

Third. Said vessel left the port of New York on said seventh day

of May, 1887, in charge of a competent pilot, and proceeded down the bay, and, a dense fog having set in, she anchored at Gravesend bay for the night. On the following morning, the fog having cleared away so that the buoys marking the channel could be seen a considerable distance off, she weighed anchor and proceeded to sea. The pilot — at about 7.05 o'clock a. m., a short distance inside of the entrance buoy, and the steamer headed on her course about E. by S. ½ S. After the pilot left the vessel a dense fog prevailed. The wind was about east and blowing a moderate breeze. Said steamer proceeded on her course at a speed of about three knots per hour. From entrance buoy she steered E. by S. ½ S. and afterwards E. S. E. Her master was in charge on the bridge. A competent lookout was stationed forward and the first officer was also stationed forward. The steam whistle of said steamer was regularly
7 blown at intervals of within thirty seconds. At 7.55 o'clock a single blast of a fog-horn was heard off the starboard bow of the steamer. Almost simultaneously therewith the first officer called out to hard-a-port the helm. The master, who was on the bridge, could not at that time discern anything on account of the thickness of the fog, but immediately as the mate gave said order the helm of the steamer was hard-a-ported and the master by telegraph ordered the engines of the steamer to be reversed at full speed, and they were so reversed. Almost immediately thereafter a vessel was seen on the starboard bow of the steamer, which subsequently proved to be the barkentine F-eda A. Willey; said barkentine had all her sails set except the fore-royal and the main and mizzen gaff-topsails and was proceeding when cited at the rate of about five knots an hour. She was on the starboard tack and when sighted was headed on a northerly course. The speed of the steamer kept continually lessening, and the steamer had got down to a very low rate when the said barkentine ran into her *her*, striking her on the starboard bow just abaft the stern, starting a plate and causing damage and detention, which libellants, upon information and belief, allege will exceed the sum of thirty-five hundred dollars.

Fourth. The collision was caused solely by the negligence and unskillfulness of those navigating the said barkentine, in that said barkentine was proceeding at too high a speed in a fog, in that she did not have a proper lookout stationed and set, in that she
8 did not give proper signals, in that she did not blow her fog-horn properly nor at sufficiently short intervals, and that she managed herself negligently and unskillfully when the collision was impending.

Fifth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

Sixth. Said barkentine is now within this district.

Wherefore the libellants pray that process in due form of law, according to the *cause* and practice of this court in causes of admiralty and maritime jurisdiction, may issue against the said barkentine Freda A. Willey, her tackle, apparel, and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that said

vessel may be condemned and sold and these libellants paid their aforesaid damages, with interest and costs, and that they may have such other or further relief, or both, in the premises as may be just.

CHARLES HENRY WILSON,
By HAROLD A. SANDERSON, *Agent.*
ARTHUR WILSON,
By HAROLD A. SANDERSON, *Agent.*

Sworn to before me this 18th day of May, 1887.
A. L. POWERS,
Notary Public, Kings Co.

Cert. filed in New York Co.
FOSTER & THOMSON,
Proctors for Libellant, 52 Wall Street, N. Y. City.

9 The counsel for the barkentine Freada A. Willey then read a stipulation that the libel filed by the libellant, Ichabod Willey, should stand as the answer of the claimants in the cross-cause as follows:

U. S. District Court, Southern District of New York.

CHARLES HENRY WILSON and Ano.
v.
BARKENTINE F-EDA A. WILLEY.

We hereby consent that the libel in the case of Ichabod Willey against the steamship Martello stand and be considered as the answer of the claimants in this cause.

Dated New York, July 29, 1887.

FOSTER & THOMSON,
Proctors for Libellants.

The advocates for the respective parties then read the testimony taken and the depositions read in evidence on the trial in the district court.

Upon the trial of the said causes in the said circuit court the following was the only evidence introduced by either the libellant or the respondent in the original cause brought on behalf of the "F-eda A. Willey" or the libellant or respondent in the cross-cause brought on behalf of the "Martello," and the facts hereinafter referred to are the only facts as to all or any of the evidence in the case, proofs or tenders to prove, which have any bearing upon the facts found by the court or which the court refused to find as aforesaid, and
10 to which findings or refusals the owners of the "Martello" have excepted, such evidence when referring to more than one finding or refusal to find not being repeated, but the evidence being inserted as relating especially to the point in respect of which it is cited and to such other points as to which it may be applicable, viz:

As bearing upon the fact found in the third finding of fact that the "Martello" got under way from Gravesend bay about 6 a. m. Sunday, May 8, 1887, the evidence introduced as aforesaid in addition to that set forth in connection with the other findings of fact is as follows:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

I was in command of the steamer Martello voyage before last. We started on the 7th May; the weather was foggy and we anchored in Gravesend bay.

Q. When did you raise anchor?

A. We raised anchor the following morning about half past five.

By Mr. GOODRICH:

Q. You say you got your anchor up at 5.30?

A. Yes, sir.

Q. Do you mean to say that is the time you started?

A. Yes, sir; about that time.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

I was first officer at the time the collision took place
11 with the barkentine. The weather, when we anchored, was very foggy.

Q. How was it next morning?

A. At 5 o'clock in the morning when I turned out it was sufficiently clear to see the buoys and any marks that we needed to see.

Q. What time did you start?

A. Half past five.

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

I was on the Martello on her outward trip from here in May of this year as third mate.

Q. What time did she raise anchor in the morning?

A. Half past five.

Q. What did she do then?

A. Steamed down the harbor in charge of the pilot.

By Mr. GOODRICH:

Q. Will you say you started before six?

A. No; I turned the men down into the chain locker at half past five, but I can't say, you see, how many minutes it was before we got under way.

JOSEPH HENDERSON, on behalf of the Martello, testified:

By Mr. THOMSON:

I am a New York and Sandy Hook pilot and have been such for forty years the first day of last September. I piloted the steamer Martello on her voyage when she left here the seventh of May last.

Q. At what time did you start the next morning?

A. In the neighborhood of five or half past five.

By Mr. GOODRICH:

12 Steam was ordered for six o'clock the next morning, but six o'clock in the month of May is rather late, and next morning about half past five we saw the City of Chester coming down.

Q. Were you at anchor?

A. We was at anchor, and a couple of German boats came down before the City of Chester. I went to the engineer or sent to him and asked how long before we could have steam, so that the ship could be turned over. If I have got to go slow I want more time to do it than what I would of a clear day; my memory comes to me. He said, "I have got steam enough to turn her over now," and they would be increasing steam as they went ahead.

We hauled the anchor up. The engineer said he had steam enough to turn her over. We hove the anchor up and went slow. I found I was going to have trouble, as it was not a clear day, when you could heave your anchor up and go like a race horse. I found there had to be a feeling match and wanted to have more time for it. We was under way before six o'clock that morning, although the night before we had given orders for steam at six, as you say, because six was my time for a clear morning. When I found other ships was coming out and the weather was foggy, threatening, then I got the ship under way sooner.

JOHN MAIDER, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. How long have you been on the Martello?

A. I joined her about January of this year.

Q. You were upon the Martello at the time of the collision with the barkentine, were you?

A. Yes, sir.

13 By Mr. GOODRICH:

Q. You kept a log?

A. Yes, sir; engineers' log.

Q. When did you last see it?

A. The chief engineer has got it.

Q. How do you remember the time at 7.52 when you got the order full speed astern?

A. We keep a slate log every watch and give it to the chief engineer and he puts it in the official log.

Q. You haven't seen this memorandum since that time?
A. No, sir.
Q. How did you remember all this while that it was 7.52?
A. I took a copy of it.
Q. When did you take that copy?
A. I took it at the time.
Q. Let me see it.

Witness produces memorandum, which reads as follows:

Sunday, May 8, 1887.—Steam ordered for 6 a. m.; slow ahead 6.07 a. m., working to orders; full speed 6.26 a. m.; slow 6.49 a. m.; stopped to discharge pilot 7.03; slow ahead 7.10 a. m.; dead slow 7.20; full speed astern 7.50; stopped 7.58; slow ahead 8.33; anchored 8.42.

Q. Did you make that at the time?
A. Yes, sir.
Q. You know that these are correct?
A. Yes, sir.

As bearing upon the fact found in the fourth finding of fact that "the engines were at 7.10 a. m. moved ahead," the evidence introduced as aforesaid was as follows, in addition to that set forth
14 as bearing upon the third said other findings of fact and requested findings:

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

At five minutes past seven discharged the pilot at the station boat, just a little inside entrance buoy.

WILLIAM GERMOND, on behalf of the Martello, testified:

By Mr. THOMSON:

I live in the town of Saugerties and am actively engaged as a Sandy Hook pilot.

Q. Do you remember the seventh of May last going out in the Martello?
A. Yes, sir.
Q. Who was acting as pilot?
A. Mr. Henderson.
Q. How did you come to be going out in her?
A. I took passage down to get aboard our boat; I wanted to go on a cruise.
Q. Where was your boat?
A. Just inside the black buoy at Gedney's; outside the entrance to Gedney's channel.
Q. What time did you get there next morning?
A. At little after seven o'clock.
Q. Within what period after seven o'clock?
A. About five minutes or so; I can't tell exactly; 7.05, I think it was, when we left the ship.

JOSEPH HENDERSON, for the Martello, testified:

By Mr. THOMSON:

Q. What rate did you run along?

15 A. Part of the time six and seven miles an hour, part of the time ten, to make sure and get the ship out on time—running from buoy to buoy.

Q. What do you mean by getting the ship out on time?

A. Over the bar at high water. I would rather get her over half an hour before high water than half an hour after, so as to feel a rising tide under her if there was any trouble.

Q. What time was high tide that morning?

A. 7.54.

Q. What time did you leave the steamer?

A. Well, I should say in the neighborhood of seven, a few minutes one way or a few minutes the other. I think it was a little after seven.

Q. Where did you take breakfast that morning?

A. Aboard my boat. The steward was waiting breakfast for us when we got there. We get breakfast at seven o'clock on board the boat.

By Mr. GOODRICH:

Q. You say you left a few minutes after seven?

A. I couldn't tell you. I didn't haul out my watch and look. I should say seven to five or six minutes after.

As bearing upon the fact found in the fifth finding of fact that "about forty minutes after discharging the pilot the horn of a sailing vessel was heard," the evidence introduced as aforesaid, in addition to that set forth as bearing upon the fourth and other findings of fact and requested findings, was as follows:

16 FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. When did you hear the fog-horn that you believe to be that of the barkentine Freda A. Willey?

A. I should say 7.55.

Q. Where were you when you heard that fog-horn?

A. I was on the bridge.

Q. What did you do?

A. I put the helm hard-a-port and put full speed astern to the telegraph.

Q. What kind of a whistle was it?

A. It was one of those fog-horns.

Q. I mean was it single?

A. One single blast.

ARTHUR BRADLEY STOUT, on behalf of the Martello, testified:

By Mr. THOMSON:

I have followed the sea three years as 'prentice. I am acting quartermaster on the Martello and was acting quartermaster on her outward trip on May 8. I was at the wheel when the collision took place.

Q. Do you know what time the collision took place?

A. It would be pretty near eight bells—eight o'clock.

As bearing upon the fact found in the sixth finding of fact that "vessels could not be seen over a quarter of a mile away," the evidence introduced as aforesaid was as follows, in addition to that set forth in connection with the other findings and requested findings offered herein:

17 CHARLES BILLINGTON, on behalf of the Martello, testified as follows:

By Mr. THOMSON:

I am 30 years old. I was born in Hull, and have followed the sea 17 years from boy up to mate. I have been in the service of the Wilson line four years now, and in the Martello since she was launched as second mate and mate. I have been mate about twenty months.

Q. How dense was the fog?

A. It was so dense that we could see but a very short distance after we left entrance buoy.

JAMES OGDEN, a witness on behalf of the Martello, testified as follows:

By Mr. THOMSON:

I am an able seaman on the Martello. I have followed the sea since 1879, and am 31 years old. I have been in the steamer Martello since last trip. I joined her in New York.

By Mr. GOODRICH:

Q. When you got into the fog how far could you see a buoy—just before the collision?

A. I don't suppose 300 yards; 150, might be.

Q. 150 to 300?

A. Yes.

18 JOHN C. WOLFF, a witness on behalf of the Martello, testified as follows:

By Mr. THOMSON:

I reside in Brooklyn and am a New York and Sandy Hook pilot. I have been a Sandy Hook pilot since 1854. On the morning of the 8th May last I was, as near as I can judge, north of the lightship.

Q. Give us a general statement in regard to the character of the fog, whether it was dense or very dense or what.

A. I have seen thicker fogs; you could see, perhaps you might see, a couple of vessels-lengths.

By the COURT:

Q. Do you mean your own vessel or a steamer's length?

A. Say, you could say six to eight hundred feet.

Q. Do you think there was any difference in the condition of the fog at the time you heard the crash and the time you got up within sight of them?

A. No; I think it was about the same.

Q. Do you recollect so as to give me an idea about how far away you could see those vessels when you first saw them looming through the fog as you approached them?

A. I might have seen them some 6 or 700 feet.

Q. Is that your best judgment about it?

A. Yes, sir.

19 ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. In April last did you start from Pensacola to New Haven with a cargo of pine lumber?

A. Yes, sir.

By the COURT:

—. He hove in sight at that time?

A. Just about the time I was blowing the last whistle I see him.

By Mr. THOMSON:

Q. You say you could see a quarter of a mile at the time?

A. To the best of my judgment.

Q. Could you see anything smaller than a big ship a quarter of a mile away?

A. It would depend on what it was.

Q. Could you see a buoy a quarter of a mile?

A. I should judge I could if it was a big one.

MIKAL LUDVIGSEN, on behalf of the Willey, testified:

By Mr. DEADY:

Q. How far could you see a vessel?

A. About a quarter of a mile; no further than that.

By Mr. THOMSON:

Q. How far was it from the stern of the steamer to the stern of the barkentine when you saw them first?

A. It would be about fifty fathoms.

Q. And you were looking out to see the steamer just as quick as you could see her through the fog?

A. Yes, sir.

20 Q. And when she loomed up that was the position exactly?
A. Yes, sir.
Q. And about fifty fathoms was the distance?
A. Yes, sir.

JOHN BURNS, on behalf of the Willey, te-tified:

By Mr. THOMSON:

Q. How far do you think you could have seen a vessel that morning when you came on deck?
A. I saw him for about four hundred yards off, I should say. That is about as far as you could see him.

CHARLES COBB, on behalf of the Willey, testified:

By Mr. THOMSON:

Q. Now, tell me how much fog there was. Was it a real thick fog?
A. Quite thick. You could see a quarter of a mile—about fifteen lengths of the barkentine. From the Wall-street ferry to 61 Wall street I should call a half of a mile.
Q. Do you know where Wall-street ferry is?
A. Yes, sir.
Q. How far is that from here?
A. I don't know; about——

By Mr. DEADY:

Q. How many times before in your life have you been from Wall-street ferry up here?
A. Twice in my life.
Q. Then you had never noticed the distance between here and Wall-street ferry?
A. No, sir.

21 As bearing upon the fact found in the sixth finding of fact that three knots an hour would give the Martello good steerage way, the evidence bearing thereon is set forth in connection with the requested findings of fact numbered 21, 22, 23, 24, 26, 27, 28, 29, 42, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, and 93, in addition to that stated in connection with the other findings and requested findings and in the findings of the court herein, and the following:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. How many miles an hour headway must your ship be under in order to have steerage?
A. About 2½ to 3 knots.

And as bearing upon the fact found in the sixth finding of fact that the speed of the Martello was about 5½ to 6 knots an hour, the

evidence introduced as aforesaid, in addition to that stated in connection with the requested findings numbered 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, in addition to that stated in connection with the other findings and requested findings of fact, is as follows:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. At what rate did you proceed?
A. At what rate of speed?
Q. Yes.
22 A. Well, I should think about 3 to 3½ knots.
Q. Tell me what rate you were going when you heard the horn.
A. We were going about 3½ knots.
Q. Where were you when the pilot left you?
A. The pilot left a little inside of the entrance buoy; a little to the westward. We saw the pilot-boats at anchor. The weather got thicker. We saw pilot-boats at anchor, and a little after the pilot left we saw entrance buoy on our port side. It was not very thick when the pilot left us; sufficiently clear to see a vessel.
Q. Did you hear any fog-horns?
A. We heard the whistling buoy on our starboard some time after we passed entrance buoy. After the pilot left we steered east by south.

By Mr. GOODRICH:

Q. And whereabouts was it that the pilot left you?
A. I can show you there (indicating on chart). Just a little bit past the entrance buoy. The entrance buoy, I think, is the buoy in the Gedney channel called the perch-and-ball buoy. At any rate, it is to the northward and westward of the whistling buoy.
Q. About what distance northward?
A. About half to three-quarters of a mile.
Q. Did you leave the swash channel and enter Gedney's channel?
A. Yes; we got out here (pointing to the map). Just after the pilot left us we saw the buoy—entrance buoy.
Q. The pilot had left you long before you got to the whistling buoy?
A. The pilot left us before we saw that buoy (indicating entrance buoy).
Q. On which hand did you leave the whistling buoy?
A. On the starboard side—southward.
23 Q. Whereabouts was it that you slackened speed?
A. Immediately after the pilot left.
Q. That is, before you got to entrance buoy?
A. Yes, sir.
Q. How far were you from the entrance buoy at that time?

A. When the pilot left?
Q. Yes.
A. I suppose ½ a mile to ¾.
Q. How fast were you going when the pilot left?
A. We were stopped to let him out.
Q. How did you start on again?
A. Put the telegraph slow ahead.
Q. How many miles does that mean?
A. 3½ to 4 knots.
Q. Was there any fog at that time?
A. There was.
Q. At the time the pilot left you?
A. There was fog, but you could see the pilot-boat.
Q. How far could you see the pilot-boat when the pilot left you?
A. A quarter of a mile. We saw the station-boat and we saw No. 9. The pilot that left us belonged to No. 9. His boat was anchored there and he went to her.
Q. How far was the pilot-boat away?
A. A quarter of a mile—perhaps not so much—to the southward.
Q. Where was the station-boat?
A. To the northward about the same distance.
Q. They were, you say, about the same distance from *you* your ship?
A. Same distance.
Q. Did you see any other boat?
A. Shortly afterwards.
Q. How long after?
24 A. A few minutes after. Just as we passed the entrance buoy we saw a pilot-boat close to it, about the same distance off.
Q. Was there any fog at the time?
A. Yes.
Q. How far could you see the pilot-boat at that time?
A. ¼ of a mile at the outside; perhaps not so much.
Q. How fast were you going?
A. 3½ knots.
Q. That was at the entrance buoy?
A. Yes.

See chart, Exhibit 1, where Capt. Jenkins locates collision.

We were about northward from the light-ship.
Q. And how far do you judge from the light-ship?
A. I should say about two miles from her, as near as I could judge.
Q. Inside the light-ship?
A. North by compass—about north by compass.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What rate of speed were you going after the pilot left you?
A. We were going dead slow—very slowly through the water.

By Mr. GOODRICH:

Q. What rate of speed do you call slow?
A. About 3 knots to 3½ an hour.
Q. What is the last buoy that you saw—a black-and-white striped buoy?
A. Entrance buoy.
Q. Is that the buoy which is called the perch-and-ball
25 buoy?
A. I don't know what they call it.
Q. Which hand did you see it on?
A. On port bow.
Q. How far off?
A. Perhaps half a ship's length.
Q. How far is that?
A. Perhaps 150 feet.
Q. What speed were you going then?
A. 3½ knots. I don't think more than that.

JAMES OGDEN, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. The steamer proceeded along?
A. Yes, sir.
Q. At what rate of speed—how fast?
A. About 3 knots, as near as I can guess.

By Mr. GOODRICH:

Q. Was it more hazy when the pilot left you than it was when you got up your anchor in Gravesend bay?
A. No, sir.
Q. How long after the pilot left you did you run before the weather became more hazy?
A. Perhaps a quarter of an hour—half an hour. I can't say as to the time. I think we were going at half speed.
Q. Did you see any of the buoys after the pilot left you?
A. No, sir.
Q. How far could you have seen a buoy when the pilot left?
A. I can't say how far.
Q. Give me your best judgment.
A. Perhaps half a mile, sir.

26 REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Was the speed of the vessel changed?
A. Yes, sir; went slower.

Q. How much slower?
A. About 3 knots to 3½ knots an hour.
Q. At what rate do you suppose she was going before you gave the order?
A. Perhaps 4 or perhaps a little over.

By Mr. GOODRICH:

The steamer's whistle was blowing for 30 seconds just before the pilot left. The fog got quite dense immediately after he left. Within five minutes after he left it came down dense fog and kept getting thicker.

Q. Are you sure what time the pilot left?
A. Yes, sir; five minutes past seven. That is the time.
Q. What time did you start ahead again after the pilot left you?
A. He wasn't a minute leaving—about six minutes past seven.
Q. You said you were inside entrance buoy. What do you mean?
A. Perch-and-can buoy.
Q. On which side of your ship was the perch-and-can buoy?
A. The port side.
Q. How far away from you was it when the pilot left?
A. I cannot say.
Q. One witness says ¾ of a mile. Is that right?
A. It was directly after we sighted it. As he left in the
27 boat he called out, "You will see entrance buoy on your port bow." I went to the port side and saw the entrance buoy.
Q. How far away was it when you saw it?
A. Nearly half a mile, I should say.
Q. When the pilot left you how were you heading?
A. I can't say. We changed our course then to east by south—half south.
Q. So that when you saw the buoy you were heading east by south—half south?
A. Yes, sir; about that.
Q. How many points off your bow was the perch-and-ball buoy when you first saw it?
A. 2½ points.
Q. And about half a mile away as you saw it?
A. Yes.
Q. Could a man have seen that perch-and-ball buoy when the pilot left?
A. Yes, sir; if he had been looking in that direction.
Q. Wasn't there fog enough to stop it?
A. No; the fog came down immediately the pilot left.
Q. Can you form a judgment of how far that was from you when the pilot left you?
A. I can't say; about a mile, as near as I can say.
Q. You used on your direct examination the words "we saw it was going to be settled fog." What time did you refer to?
A. Just after the pilot left.

Q. And that was before you reached the entrance buoy?
A. Three-quarters of a mile. She would have run that in a very little time.
Q. My question is as regards the entrance buoy when you saw it was going to be settled fog.
A. Just before we got to it.
28 Q. Did you say the fog was thicker before or after you passed the entrance buoy?
A. After.
Q. How long after you passed the entrance buoy did it become thicker?
A. It became thicker all the time; grew thicker all the time.
Q. From the instant you passed?
A. Not from the instant.
Q. Do you mean from the instant you passed the entrance buoy?
A. From the instant the fog came down it grew thicker.
Q. How far had you passed the entrance buoy?
A. I can't say, because we couldn't see the buoy.
Q. You were outside the buoy at the time?
A. Yes, sir; outside.
Q. Of course, the buoy was astern of you?
A. Yes, sir.
Q. That was when it was very thick?
A. I couldn't see the buoy then.
Q. Were you looking forward then?
A. Yes, sir.
Q. You don't know whether you could have seen it looking in the direction?
A. I don't think that I could.
Q. How far do you believe you were from the entrance buoy when the pilot left, as well as you can judge?
A. I couldn't say; about nearly a mile.
Q. You said, as I understood you, on your direct examination at one time you thought it was half a mile.
A. I wouldn't say; for half a mile or a mile.
Q. Why do you say now that you believe it was half a
29 mile or a mile? Which was it nearest to?
A. I can't say. It is a thing you are unable to judge just from a judgment. I looked over the bow and saw it there just after the pilot left, and we had gone some little distance then. When I saw it perhaps it would be half a mile; when the pilot was on board it might have been a mile. We would have been going a little in the interval. I was asked how far when I saw it and how far when the pilot left; I say I can't tell.
Q. You could see it plainly, could you?
A. Well, I did see it.
Q. There was no fog to obscure?
A. Not any dense fog.
Q. You could see it anyway?
A. Yes, sir.
Q. Until you passed it?

A. Yes, sir; saw it abreast of us.
Q. You were south of it, were you not?
A. Yes.
Q. How far?
A. Less than a quarter of a mile.

ARTHUR B. STOUT, on behalf of the Martello, testified:

Q. Did the ship stop when the pilot got off? Did it stop to do it or only slow up?
A. No; stopped.
Q. You say that when the pilot left you you stopped still in the water.
A. I wouldn't say we were stopped still in the water; the engines were stopped.
Q. Was your boat stopped?
A. I can't say as to that.
Q. How long had you stopped the engines when the pilot left you?
30 A. I don't know; I suppose they stopped as near as they could.
Q. Almost dead still in the water?
A. Yes.

Counsel for the Martello offers in evidence from the engineer's log of the Martello the following:

May 7: Steam ordered and ready for 4 p. m.; moved engines at 4.25 p. m.; moved engines as required until 6.34 p. m.; then anchored and done with engines. Dense fog. Keeping steam handy to move if required.

May 8: Moved engine slow ahead at six hours and seven minutes a. m., moving engines as required until 7.03 a. m.; then stopped to discharge pilot; moved engines slow ahead at 7.10 a. m.; received orders at 7.20 a. m. to go as slow as possible; full speed astern at 7.50 a. m.; stopped at 7.58 a. m.; whilst going full speed astern felt ship strike something; slow ahead at 8.23 a. m.; stop at 8.25 a. m.; slow ahead at 8.32 a. m.; stop at 8.35 a. m.; slow ahead at 9.15 a. m.; stop at 9.16 a. m.; slow ahead at 9.20 a. m.; stop at 9.21 a. m.; slow ahead at 9.26 a. m.; stop at 9.27 a. m.; slow ahead at 9.31 a. m.; stop at 9.32 a. m.; done with engines at 9.53 a. m.; anchored, having been in collision with a barkentine, keeping sea watches and steam ready to move if required.

JOHN C. WOLFF, on behalf of the Martello, testified:

By the COURT:

Q. Did you see anything of the collision yourself?
A. No, sir; it was foggy; only I heard the crash. I don't
31 know but very little about it; only that I was lying to in the fog with my boat from north to north-northeast of the light-ship, then Sandy Hook light-ship.

By Mr. THOMSON:

Q. How far from the light-ship, according to your best judgment?

A. We could hear the bell, and heard it, too, just before the collision took place.

Q. How far did you judge, for that or any other reason, you were north?

A. It might have been, perhaps, a couple of miles.

By Mr. GOODRICH:

Q. At the time you heard the blow you were from north to north-northeast of the light-ship, according to your best judgment?

A. Yes, sir.

Q. How far from it?

A. About two miles.

Q. Where was the crash—in which direction from you?

A. It was to the south of us; whether it was south or south by east I can't tell.

Q. How far do you think the crash was from you?

A. It might have been a quarter of a mile—might have been.

CHARLES COBB, on behalf of the Willey, testified:

By Mr. DEADY: Was there any change in the speed of the steamer up to the time of the collision from the time you saw her?

A. I couldn't tell that, but I don't think there was.

32 JOHANN MATHLIN, on behalf of the Willey, testified:

By Mr. DEADY:

Q. How fast was she going? Did she slow up any from the time you saw her until the collision?

A. O, no; it looks as if she was coming very quick with her head.

Q. Was there any change in the steamer after you saw her?

A. I can't tell you.

MIKAL LUDVIGSEN, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Was there any change in the steamer's speed from the time you saw her until the collision?

A. None that I can tell.

JOSEPH FRATES, on behalf of the Willey, testified:

By Mr. DEADY:

I should judge she was going five or six knots—not more. There was no change in her speed from the time I first saw her until the collision. I should judge she was going between six and seven knots, but I am no judge. I didn't see how fast her screw was going, but I could tell pretty well from the water that was coming up under her stern.

33 JOSEPH GREEN, on behalf of the Willey, testified:

Q. What did her speed seem to be to you?
A. I thought she might be going somewhere about eight knots.

By Mr. THOMSON:

Q. You could see her plain, could you?
A. No, sir; I could not see her plain.

JOHN BURN, on behalf of the Willey, testified:

Q. Did you notice how she was going—how fast she was going?
A. Well, I could not tell. She must have been going pretty fast from the time she was reported until she struck us.

FRANK EUSTICE, on behalf of the Willey, testified:

Q. How fast was the steamer going—did you notice whether she was going fast or not?
A. She must have been going fast. When I came on deck the steamer was about a boat's length away from us.

ICHABOD WILLEY, on behalf of the Willey, testified:

Q. At what rate of speed, in your opinion, was the steamer going when she hit you?
A. I should say 6 or 7 knots, certainly.

MICHAEL W. CROWELL, on behalf of the Willey, testified:

Q. You are one of the surveyors for the underwriters in this port, are you not?
A. Yes, sir.
Q. At what rate of speed must the steamer have been going to have caused the damage which you saw?
A. Between 7 and 8 knots.

34 ALBERT SPENCER, on behalf of the Willey, testified:

Q. At what rate of speed must the steamer have been going to have caused the damage which you saw?
A. From my judgment, I should say she was going between 6 and 7 knots.
Q. At the instant of collision?
A. Yes, sir.

FRANCIS MARTIN, on behalf of the Willey, testified:

Q. In your judgment, at what rate of speed must the Martello have been going to have caused that damage?
A. Of course, I can only give you my judgment about it. From the appearance of the vessel and where she was struck, I should say at least six knots.

CHARLES W. KENNEDY, on behalf of the Willey, testified:

Q. Can you form an estimate of the rate of speed at which the steamer must have been going at the time of the impact upon the Willey?

A. Judging by what I have seen of other collisions—the two I refer to—I should say that the steamer at the least would be going about seven knots.

Q. At the instant of collision?

A. At the instant of collision; yes, sir.

As bearing upon the fact, found in the seventh finding of fact, that "the Freda A. Willey" loomed in sight a minute or two after the hearing of the horn, the only evidence introduced as aforesaid was as follows, in addition to that stated in connection with the other findings and requested findings of fact herein:

35 FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did you hear the fog-horn of the Willey?

A. I did, sir.

Q. What did you do?

—. When we heard the hour the first mate on the forecastle sung out, Hard-a-port. I put the helm hard-a-port and put full speed astern to the telegraph.

Q. Did you see the barkentine by this time?

A. I didn't see the barkentine until after I had put the engines astern.

Q. How long before she loomed in sight to you?

A. A moment or two; a very short time.

Q. When you say a moment you mean a second, or merely an instant, or what?

A. Well, say about ten or twelve seconds.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What was done when you heard the barkentine's horn?

A. At the same time as I heard it she hove in sight almost immediately.

By Mr. GOODRICH:

Q. How far away from you was she when you gave the order to put the helm hard-a-port?

A. As soon as I saw her.

Q. That is the first hail you gave?

A. I sung out the fog-horn first and as she came in sight I sung out, Hard-a-port.

Q. Was that the only signal you heard?

A. That is the first signal I heard.
36 Q. How do you know?
A. Because she hove in sight immediately.

JAMES OGDEN, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. How long was it from the time you heard the fog-horn till the time you saw the barkentine?
A. Must have been a minute, sir; about a minute from the time I heard the horn until I saw the barkentine.

WALTER WELLSMAN TUCKER, a witness on behalf of the Martello, testified as follows:

By Mr. THOMSON:

I am an able seaman. I have been in the Martello about two months. I was on board when the collision took place with the barkentine. At the time of the collision I was on the starboard side of the forecastle head. When I heard the fog-horn I looked where it was—which direction. It appeared to come from the starboard side—pretty near ahead.
Q. You started to look in that direction?
A. Yes, sir; for the vessel.
Q. How long before you saw the vessel?
A. About a minute.

As bearing upon the fact, found in the eight- finding of fact, that "the barkentine Freda A. Willey was bound into the harbor of New York," the only evidence introduced, as aforesaid, was as follows, in addition to that stated in connection with the other findings and requested findings of fact:

37 CHARLES COBB, a witness on behalf of the Freda A. Willey, testified as follows:

By Mr. DEADY:

I am a seaman; I was last connected with the Freda A. Willey; I joined her about the 20th April, at Pensacola; I left Pensacola in her.
Q. Bound for where?
A. New Haven.

MIKAL LUDVIGSEN, a witness on behalf of the Freda A. Willey, testified:

By Mr. DEADY:

I am connected with the F-eda A. Willey as first mate; I left Pensacola the 24th of April in her.
Q. Bound for where?
A. New Haven.

ICHABOD WILLEY, on behalf of the Freda A. Willey, testified:

Q. In April last did you start from Pensacola for New Haven with a cargo of yellow-pine lumber?

A. Yes, sir.

Q. You were bound for New Haven through the sound, were you?

A. Yes, sir.

As bearing upon the facts found in the 9th finding of fact, that the Willey with all her sails set can make ten knots an hour; with the wind as found in the sixth finding, the Willey, if going at less than four knots an hour, would not have steerage-way sufficient to give her master thorough control of her to tack, wear, or manage her, as occasion might require, the only evidence introduced, as aforesaid, in addition to the facts stated in the findings of the court herein and in connection with and as bearing upon the other
38 findings and requested findings, is as follows:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. Look at the paper now shown you and marked Exhibit A, of this date, and state what it is.

A. This is a draft of the sails of the barkentine Freda A. Willey.

Q. Is that the draft used for the making of the sails when the vessel was originally built?

A. Yes, sir.

Q. And was it on the barque at the time of the collision?

A. Yes, sir.

Q. Have you had sails made according to this draft since the original sails were made?

A. Yes, sir; a whole new suit.

Q. Beginning with the spanker, will you enumerate the sails which your vessel had originally, with the square yards of canvas in each of them?

A. Spanker, 423 yards; mizzen-gaff-topsail, 128; mainsail, 392; main-gaff-topsail, 149; main-staysail, 191; middle-staysail, 122; main-topmast-staysail, 139; *main-topmast-staysail, 139;* main-top-gallant-staysail, 99; foresail, 340; lower fore-topsail, 209; upper fore-topsail, 212; fore-topgallant-sail, 210; foretop-royal, 113; fore-topmast-staysail, 90; jib, 108; flying jib, 117; outer jib, 140; total, 3,182 yards.

Q. On the day before the collision did the vessel have all sail on her?

A. Yes, sir.

Q. What was the wind?

A. The wind was light.

Q. Was that the reason why you had all sail on her?

A. Yes, sir.

39 Q. And you were then standing in and out of the harbor, waiting in order to get a chance to come in?

A. Yes, sir; waiting for a glim, for the fog to lift.
Q. What was the wind at that time—the day before?
A. Very light; calm at times.
Q. When did you first take off any of your sails?
A. At six o'clock the night before, or thereabouts.
Q. What sail did you take off?
A. Mizzen-gaff-topsail, main-gaff-topsail, middle-staysail, and top-mast-staysail.
Q. Why did you take off these four sails?
A. I took them off because there was no wind to hold them still, and they were chafing.
Q. When did you take in any other sail?
A. I took in the fore-royal at five o'clock in the morning of the collision.
Q. Did you make any other change in your sails before the collision?
A. I hauled up the foresail at 7 o'clock in the morning before the collision.
Q. Is the total amount of the sail thus taken off on the 7th and 8th 991 square yards?
A. That is the way I figure it; yes, sir.
Q. When you say that you hauled up the foresail at seven o'clock, describe how it was hauled up.
A. We hauled it up right snug under the yards and didn't furl it.
Q. Was it drawing at all?
A. No, sir.
Q. How much speed can your vessel make with all her sails set?
A. She is a good ten-knot vessel loaded or twelve light, in a nice set of ballast.
Q. With the sail which you had set after hauling up the foresail, how does the drawing force of those sails compare with the drawing force of full sails and in that wind?
A. I should say a couple of knots, a knot and a half or two knots.
Q. How were you heading just before the collision?
A. North.
Q. How was the wind?
A. The wind was east by north to east-northeast.
Q. Were you sailing close-hauled?
A. Yes, sir.
Q. And on what tack?
A. On the starboard tack.
Q. Why could you not have taken off the spanker?
A. Because my vessel would not have been able to tack. I could not tack or handle her without.
Q. Why not?
A. Because she would not have headway enough to come up and head the sea.
Q. Was there any sail which you had set between seven and eight which you could have taken off and saved your vessel?
A. Not that I could have taken off her and tack her and handle her.

Q. What was the force of the wind between 7 and 8?

A. A five or six knot breeze for all sail.

Q. Is that the way you talk about a breeze aboard your vessel—the rate she is making?

A. Yes; sometimes if she is making four knots with the canvas she has on we sometimes say four-knot breeze with the canvas we have.

Q. Could you have taken off a single sail or reefed a sail that you had set between 7 and 8 and had steerage-way on your vessel?

41 A. I could not and have command of the vessel so I could steer her, tack, or wear or handle the vessel.

Q. During the night what did you do with your vessel?

A. At 5 o'clock on the 7th of May we wore ship in 11 fathoms of water, headed off shore to the southerly, light winds, and at 4 o'clock in the morning we wore ship and headed in again.

Q. What did you wear ship for?

A. I wore ship to tack off and on waiting for a glim—that is, waiting for the fog to lift.

Q. During this time did you have anything more than steerage-way on your vessel?

A. No; that night we hadn't steerage-way for a time. We only made 20 miles from 5 p. m. until 4 a. m. in all that time.

Q. And from 4 a. m. on May 8th until the collision, how much did you make?

A. We made about 16 miles in the four hours; from 4 o'clock we wore ship until 8.

Q. Why did you take off your fore-royal at 5 o'clock a. m. on the morning of the 8th?

A. Because the wind began to freshen and I had more speed than I needed.

Q. Why did you haul up the foresail at 7 a. m.?

A. Because it freshened more and I had more speed than I needed with it on.

Q. Was it possible for you to have taken any sail off your vessel between 7 and 8 and have steerage-way?

A. No; not and handle my vessel.

Q. When you heard the whistle of the steamer Martello, why did you not take off some of your sail?

A. Because I had not any more -han I needed to handle the vessel. I couldn't handle her with less.

42 Q. Was there any way of lessening her speed except by taking off sail?

A. No, sir.

As bearing upon the fact found in the tenth finding of fact that "at 7 a. m., the wind freshening, the foresail was hauled up," the only evidence introduced as aforesaid was as follows, in addition to that stated as bearing upon the other findings and requested findings of fact:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

She had all her sails set; all her gaffs. She had her fore-royal furled and she had three jibs, a gallant-sail, two topsails and fore-sail, and her mainsail and mizzen were all set.

Q. How was she sailing, how close to the wind?

A. She appeared to be quite full; everything was full, wasn't shaking a bit.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What sails did the barkentine have out?

A. His head sails; all square sails excepting the royal and the mainsail and mizzen.

Q. How far was she from you when you first saw her?

A. I should think about the length of our ship; 300 or 400 feet, perhaps.

43 JAMES OGDEN, on behalf of the Martello. testified:

By Mr. THOMSON:

Q. What had she on her; what sail?

A. I noticed that she had the fore-royal and two gaff-topsails; she had in. I didn't see that she had any other canvas in.

Q. Did she have all the rest set?

A. All was set, sir, as near as I could tell.

By Mr. GOODRICH:

Q. Wasn't the foresail clewed up?

A. No, sir.

Q. Will you swear that the foresail was set?

A. I will.

WALTER WELLSMAN TUCKER, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. How about her sails?

A. She had her fore-royal fast and her two gaff-topsails was made fast; the staysails, I couldn't say whether it was all made fast or not.

By Mr. GOODRICH:

Q. Was her foresail set?

A. Yes, sir; her foresail was set.

Q. Sure about that?

A. Certain of it, sir.

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What was the appearance of the barkentine when she came along?

44 A. She had all her sails set forward with the exception of the fore-royal. She had all the square sails set. She had, I suppose they call it, a mainsail and mizzen-sail. She had no gaff-topsail set.

By Mr. GOODRICH:

Q. You say the barque had all her courses set?
A. She had only one foresail.
Q. Don't you call the lower sails a course?
A. No; she had her foresail set.
Q. Will you swear to that?
A. Positively.
Q. Up to the collision?
A. Up to the collision.

MIKAL LUDVIGSEN, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Tell me what sails were not up on that barkentine.
A. The middle and main topmast staysails were not up and the two gallant-topsails and the royal and foresail were clewed up.

CHARLES COBB, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Tell me what sails you had up, or, rather, tell me what sails you did not have up.
A. We didn't have up the two jib-topsails, main-topsail, royal and foresail.

45 As bearing upon the fact found in the eleventh finding of fact that the barkentine was sounding her horn at intervals of one or two minutes, the only evidence introduced as aforesaid, in addition to that stated in connection with the requested finding numbered 71 and in the findings of the court herein, — as follows:

CHARLES COBB, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Where was the captain?
A. The captain was aft.
Q. What was he doing?
A. He was walking and blowing the horn.
Q. What kind of a horn?
A. A tin fog-horn.

Q. How was he blowing the horn?
A. Blowing one blast.
Q. How often?
A. Every minute and a half or two minutes.
Q. How far could that horn be heard?
A. About ¾ of a mile. He had been blowing it all day—all the morning.

MIKAL LUDVIGSEN, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Who was on deck when you first saw this steamer?
A. Me and the captain and the man at the wheel and the lookout.
Q. Where was the captain?
A. The captain was aft, sir.
Q. And where were you?
46 A. Aft, sir. The captain was blowing the horn.
Q. How often?
A. Couple of minutes between.
Q. How was he blowing it?
A. He was blowing one blast, sir.

JOHANN MATHLIN, on behalf of the Willey, testified:

By Mr. DEADY:

Q How long after that did the vessel strike?
A. Not even half a minute.
Q. Before that what was the captain doing?
A. He was blowing the fog-horn—the captain was blowing.
Q. How often was he blowing it?
A. Every minute.
Q. How would he blow?
A. One.

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. How many blasts was that whistle?
A. I heard her give one whistle.
Q. What did you do then?
A. I took the horn and answered it.
Q. The mate was not blowing the horn the same time you were, was he?
A. No, sir; there was only one horn blowing. When I found the steamer was coming too near I took the horn from the mate and blew it myself.
Q. An ordinary horn that is in use aboard vessels, isn't it?
A. Yes, sir.
Q. Was that horn being sounded after four o'clock?
A. Yes, sir.

47 Q. How often?

A. At intervals not exceeding two minutes; might have been a minute or a minute and a half sometimes.

By Mr. THOMSON:

Q. Had the mate any orders from you how often he should sound it?

A. He knew himself without orders.

Q. He had no orders from you?

A. No, sir.

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did you hear the fog-horn of the Willey?

A. I did, sir.

Q. You were on the bridge?

A. I was.

Q. How many times did you hear it?

A. I only heard it once.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Do you remember hearing a horn from the barkentine?

A. I did, sir; heard it once.

By Mr. GOODRICH:

Q. Was that the only signal you heard?

A. That is the first I heard.

Q. How do you know?

A. Because she hove in sight immediately.

JAMES OGDEN, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did you hear the fog-horn that turned out to be the fog-horn of the barkentine?

A. Yes, sir. I reported it.

48 WALTER WELLSMAN TUCKER, on behalf of the *of the* Martello, testified:

By Mr. THOMSON:

Q. Did you hear a fog-horn that day after the pilot left?

A. Yes, sir.

Q. How many?

A. One, sir.

Q. You mean the fog-horn that turned out to be that of the barkentine?

A. Yes, sir.

By Mr. GOODRICH:

Q. Did you hear the fog-horn of the barkentine before anybody spoke to you?

A. I heard it myself; no one told me about it.

REGINALD HORNCASTLE, for the Martello, testified:

By Mr. THOMSON:

Q. Did you hear the barkentine horn?

A. Yes.

Q. How many times did you hear it?

A. Once.

ARTHUR BRADLEY STOUT, for the Martello, testified:

By Mr. GOODRICH:

Q. How many horns did you hear from the barque?

A. One.

Q. Only one?

A. Yes.

JOHN C. WOLFF, for the Martello, testified:

By Mr. THOMSON:

When this steamer was to the southward of us we heard a fog whistle—not a fog whistle, a fog-horn—once, and a few minutes immediately after we heard the fog-horn I remarked, "That is a pilot's boat fog-horn." We heard a crash and I said, "That steamer has struck something," and we hove the boat around to see if we couldn't save something.

49 Q. How long after you heard the horn was it that you heard the crash?

A. Very shortly after we heard it. We only heard the horn once. We heard the crash.

Q. Almost immediately?

A. Almost immediately; a very short time. We steered to the direction and in a few minutes I saw the steamer and a barkentine under his bow.

Q. What steamer was it?

A. The steamer Martello, and we sailed a very little to the southward of it, wore around again, and then we got near enough and found out he wanted a pilot and saw him getting a hawser to this barkentine.

As to the fact contained in the 11th finding of fact that the barkentine was "making about four knots an hour," the evidence introduced as aforesaid, in addition to that stated in connection with and relating to the requested findings of fact Nos. 33, 34, 36, 37, 39, 40, 41, 42, 47, 94, 96, 97, 101, 102, and 103 and the finding of the cause herein and the other findings and requested findings of fact, was as follows:

FRANCIS ELDON JENKINS, for the Martello, testified:

By Mr. THOMSON:

She appeared to be going pretty fast through the water. I couldn't say exactly, but I should think she would be about five or six knots, as far as I could judge.

50 CHARLES BILLINGTON, for the Martello, testified:

By Mr. THOMSON:

Q. How fast do you judge she (the barkentine) was going at the time of the collision?
A. I should say about five knots; might be a little more, perhaps.

JAMES OGDEN, for the Martello, testified:

By Mr. THOMSON:

Q. At what kind of speed did the barkentine appear to be going?
A. Five knots an hour, I should think she would be coming, sir.

REGINALD HORNCASTLE, for the Martello, testified:

By Mr. THOMSON:

Q. At what rate of speed was the barkentine coming?
A. By appearance about five or six knots.

ICHABOD WILLEY, on behalf of the Willey, testified:

Q. Did you use a log to determine the rate of speed you were going between four and eight o'clock?
A. Yes, sir.
Q. What kind of a log?
A. John Bliss patent log—a taff-rail log.
Q. What rate of speed did you make?
A. We made an average of four knots for the four hours, or up to the collision, which I suppose was near eight o'clock.
Q. What time did you take your last observation of the log?
A. At four o'clock in the morning.
Q. Did you notice after that how the vessel was sailing—her speed?
A. No, sir; not until the collision; then I had 16 miles on the log after the collision. I only know what she made for the four hours.
51 Q. Between four o'clock in the morning and the time of the collision you made 16 knots?
A. 16 miles; yes, sir.
Q. You mean nautical miles?
A. Nautical miles; that is what we call them—knots.
Q. Did the vessel make more speed before you took off some of the sails at 7 o'clock than she did before that?

A. I should say that there wouldn't be much difference. As the wind increased a little I took sails off. We appeared to be making about the same right along.

As bearing upon the fact found in the 12th finding of fact that the barkentine answered the steamer's whistle "promptly each time with a single blast of her horn," the evidence introduced as aforesaid is hereinbefore set forth in connection with and bearing upon the 11th finding of fact and the requested findings of fact herein and as follows:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. When you heard the whistle of the Martello——
A. I took the horn and sounded myself when I found she was coming near.
Q. Did you hear another whistle?
A. Yes, sir.
Q. Then what did you do?
A. I waited until the sound blew away a little and then I sounded again.
Q. And did you get another whistle?
A. Yes, sir.
Q. Did you sound your blast immediately?
A. As soon as I waited a bit for his sound to blow away.
52 Q. As soon as you heard the first whistle did you blow immediately?
A. I just waited two or three seconds for his sound to go way like and then I answered him.
Q. In two or three seconds?
A. Yes, sir.
Q. How long was that after you had blown that you heard the second whistle?
A. I judge a minute or a minute and a half, according to my judgment.
Q. Then you answered the same way?
A. After waiting a few seconds for the sound to go away.
Q. You answered it yourself?
A. Yes, sir.
Q. Did you get a third whistle?
A. Yes, sir.
Q. Did you answer that?
A. I answered it in the same way.
Q. How long was the third whistle after your second answer?
A. I judge about the same time—a minute or a minute and a half; somewheres between that.
Q. Did you answer that in the same way?
A. I answered that in the same way; waited until the sound blew away and then I answered; gave him a chance to hear it if he was there.

Q. Did you get a fourth whistle?
A. No, sir; I heard no more after that.

As bearing upon the fact found in the twelfth finding of fact that "the Martello appeared in sight a quarter of a mile away," the only evidence introduced as aforesaid is stated in connection with and as bearing upon the sixth finding of fact and the other findings
53 and requested findings herein in addition to the following:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. When you noticed these whistles did you locate from what direction they seemed to come?
A. I was trying to, standing and looking.
Q. Where did it seem to you to come from?
A. It seemed to me to come from the northwest or west-northwest or up in that direction a little.
Q. On which bow?
A. On the port bow it appeared to be coming right at the time, but the sound drawing nearer, as far as I could tell, before I seen it.
Q. At what time, in relation to either of these three whistles, did you see the Martello?
A. I seen her when I was blowing the last one.
Q. Where away did you see her?
A. About northwest I judged it was bearing.
Q. And how far away was she from you?
A. I judge a quarter of a mile.

CHARLES COBB, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Where were you when this steamer was first sighted?
A. On the gallant-forecastle.
Q. What were you doing?
A. Keeping lookout.
Q. How far was the steamer away when you saw her?
54 A. About a quarter of a mile.

As bearing upon the fact found in the fourteenth finding of fact that "the speed of the Martello at the time of the collision was about two knots an hour," the evidence introduced as aforesaid is as follows in connection with that set forth in connection with and bearing upon the requested findings Nos. 21, 22, 24, 26, 27, 28, 64, 66, 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 102, 103, and the other findings and requested findings:

FRANCIS ELDON JENKINS, for the Martello, testified:

By Mr. THOMSON:

Q. What rate had you become reduced to when the collision actually took place?

A. We had very little way on; I suppose possibly not more than a knot; that at the outside; I couldn't say exactly because they were standing by the engines and put them full speed astern immediately.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. How fast do you think your vessel was going when you struck him?
A. That is hard to say.
Q. The engines were going astern, you say, previous to that?
A. Yes.
Q. Then how fast do you think you were going?
A. If the engines had gone astern when the telegraph
55 rang we might have had little more than way; 2½ to 3 miles; 2 to 2½, I think.

By Mr. THOMSON:

That is merely my calculation that the reversed engines ought to have taken a knot off—nothing more.

As bearing upon the fact found in the fifteenth finding of fact that "the place of collision was about 1¾ miles N. by E. from Sandy Hook light-ship," the evidence introduced as aforesaid is hereinafter stated in connection with and bearing upon the requested findings Nos. 96, 97, 102, and 103 and the other findings and requested findings herein, as follows:

ICHABOD WILLEY, on behalf of the Willey, testified:

Q. From four o'clock in the morning what course did you steer?
A. About north; a little baffling, as the wind was varying, but headed about north.
Q. You said you got soundings of about 18 fathoms about 4 o'clock?
A. Yes, sir.
Q. Did you take soundings after that?
A. At 7 o'clock, when I hauled up the foresail.
Q. What soundings did you make after that?
A. 17 fathoms, I think.
Q. Which side of the Sandy Hook light-ship did you pass?
A. I passed to the eastward of it.
56 Q. How far to the eastward do you think you were?
A. I was so far that I couldn't hear it.
Q. Could not hear the bell, you mean?
A. Couldn't hear the bell.
Q. How far, in your judgment, were you to the eastward of Sandy Hook light-ship as you passed up?
A. Probably a mile or a mile and a quarter, or might have been a mile and a half.

Q. Were you listening for the bell?

A. Yes, sir.

Q. What was the first you knew of the proximity of the Martello?

A. I heard her whistle.

By Mr. THOMSON:

Q. And your theory is that the collision took place right there at the light-ship, isn't it?

A. No. I know I was not there, because I would have heard the bell if I had been there. I was telling you my reckoning would have put her there.

Q. Do I understand you properly that all you know about the place of collision is that it was not near the light-ship?

A. No; that isn't all I know. I know that after the collision he took one heave and swung to the southward and steered in southwest some quite awhile—I should judge a mile or a mile and a half—until we heard the bell on the light-boat. Then that is where I get my position from at the time of the collision.

Q. Tell us where you think the collision took place.

57 A. About a mile and a half northeast of Sandy Hook light-ship, to the best of my ability, by the courses we steered in and the time as near as I could get at it.

Q. Did you keep track of the courses you steered in?

A. I steered myself.

Q. You were attached to the steamer, were you not?

A. Yes, sir; but I steered the barkentine.

Q. Did you steer for the purpose of making the course yourself and bring the steamer along with you, or did you come along to keep with the steamer?

A. How is that?

Q. Did you do independent steering on the barkentine or did you intend to keep along with the steamer?

A. I tried to keep with the steamer, but my compass was right before me.

Q. And how far do you think it was from the light-ship?

A. I should judge a mile and a half by the time we was coming in, to the best of my judgment.

Q. Northeast?

A. About northeast.

Q. Can you tell me exactly how you steered after the collision before you came to an anchorage?

A. Not exactly. We steered in southwest. I didn't take notice particular to half a point, but I had the compass before me.

Q. If you had the compass before you that is the only ground, isn't it, for telling us, as you have already, how you steered?

A. Yes, sir.

Q. Why can't you tell us correctly how you steered, then?

58 A. Because my whole bow was knocked off, and I had a good deal of work. I couldn't look at the compass all the

while, steering as if there was nothing the matter, but I noticed the compass.

Q. Does it require you to look at the compass all the time to know the direction in which you are steering unless the direction was changed from time to time?

A. Our direction was changed very often, because we would get away off here and away off there, and we couldn't tell exactly how we was going, but I said in a southeasterly direction, as near as I could get at it.

Q. Does your last answer apply to the direction or directions in which the steering was done from the time of the collision until the time of your anchorage?

A. I am describing from the time of the collision until we heard the light-boat. After we got the light-boat we swung off more to the westward and northward.

As bearing upon the fact found in the sixteenth finding of fact that "the call of the first officer of the Martello to the barkentine to luff was not heard by those on the barkentine," the facts which the evidence in the case as aforesaid bearing thereon — are contained in the findings of the court herein in addition to the following:

59 JOHN BURNS, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Did you hear a hail from the steamer at all?

A. No, sir; I didn't hear nothing.

Q. Did you hear anybody call out from the steamer to your vessel just before the collision?

A. No, sir; I didn't hear any noise aboard of her.

No others of those on the Willey were asked directly in regard to this point.

CHARLES BILLINGTON, on behalf of the Martello, testified:

I sung out to luff all they can. Whether they heard me or not, I don't know.

As bearing upon the facts found in the seventeenth finding of fact that "from the time of the hearing of the first whistle down to the time of the collision the steamer, except as stated in the sixteenth finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern or even whether she had reversed her engines, and that in consequence the Willey held her course, as she was bound to do, but the steamer ran into her with great violence," the facts which all or any of the evidence introduced by either party as aforesaid and bearing thereon proves or tends to prove are stated in the findings and opinion of the court herein and in connection with and as bearing upon the additional requested findings on behalf of the Martello numbered 45, 46, 49, 50, 52, 53, 60, 61, 62, and in connection with the other findings and requested findings herein, in addition to the following testimony:

60 ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. THOMSON:

Q. Do you know what the rule is in regard to a sailing vessel, when in a fog, if she hears the whistle of a steamer—what is the rule in regard to her course?

A. We are supposed to keep our course. That is the rule I have been taught, unless I can avoid a collision.

Q. Did you at the time understand that rule to be inflexible that under any circumstances she should keep her course?

A. No, sir; if I could avoid an immediate collision I am to change my course.

Q. Did it occur to you at all, when you heard her whistle, that that steamer was at that time five or six minutes away from you and you knew that she was a steamer proceeding easterly, that you could save a collision by altering your course?

A. No, sir; because I shouldn't know which way to go. Whichever way I went I would be just as likely to get in the way one way as another.

Q. Then you hadn't any well-defined idea where the sound of the whistle came from?

A. Yes; I thought it was coming near all the time.

Q. I mean in what direction, whether north or south, from you.

A. It sounded somewheres to the northwest of us.

Q. If you had changed your course to a southeasterly course did it occur to you that that would avoid or tend to avoid a collision?

A. I couldn't see as it would, because I could not tell which side she would go from me.

61 Q. It would throw your stern around to her?

A. I might let him hit me in the stern instead of in the bow, perhaps.

Q. Do you think a blow in the stern when you are moving in a good breeze of wind would be as dangerous as a blow in the bow, hitting head on?

A. At the speed I was going I shouldn't eased it a great deal at the rate he was coming. It would be about four knots the little I was going.

Q. Don't you think it would give the steamer an opportunity under the circumstances and in the fog to have eased up her speed or rather to have eased it down to yours? Did that ever occur to you at the time?

A. No, sir; my plan is to hold my course until I see I can better myself by changing.

Q. Did this thing occur to you at the time?

A. No, sir; only to keep my course until I could see what that steamer intended to do—until he got so I could see him and see what he intended to do. I didn't see as I could better myself by altering my course before.

Q. How long before the collision did you see the steamer?

A. About two minutes.

Q. Did you see the direction she was sailing in?

A. Yes, sir.

Q. Did it occur to your mind that if you luffed you might have avoided a collision?

A. Yes; and I should if he had given me the proper whistles to let me know what he was going to do, but I didn't see as I could gain anything to change my course before I could know what he was going to do.

62 Q. But it occurred to you that if you luffed when he was imminently on you that you might have saved the collision by luffing?

A. No, sir; because if he was coming on a port wheel I would have kept my course and let him come in astern of me.

Q. Could you see what he was doing?

A. I couldn't tell; he was on me, apparently, right on at the time.

Q. After you saw him, suppose he had changed his direction and put his helm either to port or starboard, how many points could he have changed his direction in the interval between the time you saw him and when the collision occurred?

A. If he had done either and given me his whistle there would have been no collision.

Q. If he had put his helm either hard-a-starboard or hard-a-port how much could he have altered his direction before the time of the collision?

A. I couldn't tell, not knowing about a steamer, but after the collision happened I can see plainly if he had done that there would have been no collision. If he had starboarded his wheel and given me two short blasts I should know he starboarded, and I should have ported immediately and there would have been no collision at all. Had he ported his wheel and given me one blast I would know he was running under a port wheel and would have kept my course and instead of hitting me he would have went astern of me. When he reversed his engine had he given me three short blasts I would know he was reversed and I should have ported my wheel and we never would have met each other.

63 Q. How would you have gotten at all that you are telling us now. It would have been by the 19th rule, wouldn't it?

A. Yes, sir; that is what we go by.

Q. Is the 19th sailing article compulsory upon navigators?

A. No; but it might save collisions.

Q. Did you say if he had ported you would have starboarded?

A. No, sir. I would have kept my course to have got across him.

Q. If he had given you three whistles under the 19th article how would you judge from that that he would port his helm?

A. I wouldn't care anything about his helm. I would know with full reverse the ship wouldn't alter her course but a little, and I would be safe in porting my wheel.

Q. You know, do you, that if he had reversed at full speed that is all you would have cared for?

A. If he had let me known that there would have been no col-

lision. I would have ported my wheel then, and instead of hitting me just forward he wouldn't have hit me at all.

Q. Do you know what his duty was to do in regard to his engine under the circumstances?

A. I don't know a great deal about steamships—a master's duty.

Q. But don't you know this: that it is his duty to reverse full speed when he is in danger of a collision?

A. I know it is if he knows he will save a collision by it.

Q. When he was in danger of a collision just exactly as he appeared there before you, didn't you know it was his duty to reverse?

64 A. No, sir. If he had starboarded his wheel he wouldn't have come near me. I didn't know it was his duty to do what would hit me.

Q. Without reversing?

A. Without reversing.

Q. If he had starboarded his wheel?

A. I never could have catched him if I had tried.

Q. How much could he have altered the direction of his ship between the time you first saw him and the time of the collision by putting his wheel over hand-a-starboard?

A. I don't know enough about a steamship to know, but I know after the collision it shows me he never would have touched me.

Q. How could it have made any difference in your mind if you don't know how much effect it had on the ship?

A. I know how he hit me full speed astern, and he couldn't hit me at all if he had given me two blasts. I should have ported and we couldn't have got together at all.

Q. Did you know whether he changed his course or not?

A. I couldn't tell. If he did it was so small I couldn't tell.

Q. Were you watching to see whether he was altering his course?

A. That is all I was watching for—to see what I could do.

Q. How long, in point of time, was it between your seeing the steamer and the collision?

A. I judge about two minutes.

Q. And you were watching all that time to see whether the steamer would alter his direction?

65 A. That is what I was doing.

Q. And you couldn't see he was altering his direction at all?

A. I couldn't see he did alter it at all. It appears to me he came right up into me.

Q. Could you by luffing have saved a collision if he kept coming in on you?

A. Had I known what he was going to do in the start and luffed at first probably I might, but not knowing I did not dare, because if he was coming on a port wheel I wanted to go ahead and get by. Had he ported I should have laid still.

Q. That is to say, if you had known he was going to port his helm hard-a-starboard or hard-a-port——

A. And done nothing else?

Q. And done nothing else you could have told what to do?

A. There wouldn't have been any collision if he had let me know it.

Q. In view of your answer to that question I want to know how much you assumed at that time he could have changed his direction by putting his helm either hard-a-starboard or hard-a-port.

A. He would only have to change about 140 feet anyway, judging by the collision, and I am certain he could have done that with ease.

Q. What could he have changed 140 feet?

A. I say if he went on the port wheel without reversing he would have cleared me, because he only had from my bow to stern, which is only about 130 or 140 feet, to clear me, and apparently he did not change at all.

Q. Then to clear you to what extent would he have had to change his direction?

66 A. If he had changed it 140 feet he would have cleared me—that is, on a port wheel. He struck me forward, and 140 feet more would have put him astern of me.

Q. To change 140 feet what would have to be his change, measured by points, to make 140 feet?

A. If he had changed a point it would have done it, I should say, and perhaps less. I couldn't give it to you exactly.

Q. You say without reversing. What figure, in your mind, does the reversing cut?

A. What do you mean—in the steering of the ship?

Q. In regard to your consideration at the time as to whether you should have luffed or not.

A. I say if I had known he had reversed I should have ported my wheel, because I would know she could not alter her course a great deal under a full speed astern.

Q. But you didn't know at the time that it was his duty to reverse?

A. I can't say it was when he could have cleared me without reversing.

Q. You don't think it was his duty to have reversed under the circumstances?

A. Not without letting me know it.

Q. And those were the views you entertained at the time, were they?

A. Yes, sir.

Q. You say you didn't answer his third whistle?

A. I say I did answer it.

Q. And then he whistled no more?

A. I didn't hear any more.

Q. He hove in sight about that time?

A. Just about the time I was blowing the last whistle I see him.

67 Q. You say you could see a quarter of a mile at the time?

A. To the best of my judgment.

Q. Could you see anything smaller than a big ship a quarter of a mile away?

A. It would depend on what it was.

Q. Could you see a buoy a quarter of a mile?

A. I should judge I could if it was a big one.

As bearing upon the facts found in the eighteenth finding of fact that "had the steamer been going at three knots an hour; had she stopped her engines as soon as she heard the Willey's horn and reversed when she *cited* the barkentine, she would have stopped out of the Willey's course, the only facts which all or any of the evidence introduced by either party as aforesaid and bearing thereon proves or tends to prove are stated in the findings and opinion of the court herein and hereinafter in connection with and as bearing upon the additional requested findings of fact numbered 22, 23, 26, 27, 28, 29, 33, 35, 36, 37, 41, 47, 52, 53, 59, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 91, 94, 101, and the other findings and requested findings, and as follows:

68 FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

From the time I first saw the barkentine the only opportunity on either side to avoid the collision was for him to have put his helm down and bring her up in the wind. If he had done that I don't think he would have collided with such great force.

Q. What possibility was there on your side to have avoided it by any movement?

A. No movement at all, sir, because we went full speed astern, the only thing we could do.

Q. And held your helm hard-a-port?

A. Yes, sir; the helm hard-a-port.

Q. When you saw the barkentine it was too late for you to change the helm any way if you wanted to?

A. If we had put the helm starboard we would have had to cross her bow and she would have hit us in the middle.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. GO-DRICH:

Q. Supposing you were going at full speed and reversed hard, full speed, over how much space would your vessel run before she came to a dead stop in the water?

A. It is very hard to say.

Q. I know it, but give me your best judgment.

A. I suppose a mile and a half.

Q. Supposing she was going three and a half knots an
69 hour, loaded as she was, and got the order to reverse hard, how far would she go before she came to a stop?

A. Perhaps half or three-quarters of a mile.

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. After you saw the barkentine what was there that the steamer could have done to avoid the collision?

A. Nothing at all; nothing any more than we were doing.

Q. What could the barkentine have done?

A. Might have luffed, thrown herself in the wind or gone about.

JAMES OGDEN, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. When you first saw her what could have been done to have avoided a collision, or could a collision have been avoided, as well as you can state?

A. I can say, sir, what could have been done to avoid it. If he had luffed more I think myself he would have crossed our bow.

As bearing upon the fact found in the nineteenth finding of fact that "the master of the barkentine had his vessel under control," the only fact which all or any of the evidence in the case introduced by either party proves or tends to prove, bearing thereon, are contained and stated in the findings of the court herein and in connection with the requested findings numbers 33, 35, 36, 38, 39, 42, 52, 58, 60, 63, 91, 94, 95, 98, 100, 101, and the other findings and requested findings attached.

70 As bearing upon the fact found in the nineteenth finding of fact that "if when the steamer first sighted the barkentine the master of the latter had been advised that the steamer was starboarding her wheel he could have ported and avoided the collision," the only facts which all or any of the evidence in the case introduced by either party and bearing thereon, in addition to the facts hereinafter set forth in connection with and bearing upon the additional requested findings of fact numbered 82, 85, 86, 87, 88, 89, 90, 91, 95, 98, 99, 100 and the other findings and requested findings, are contained and set forth in the findings of the court herein.

As bearing upon the fact found in the nineteenth finding of fact that "if when the steamer first sighted the barkentine the master of the barkentine had been advised that the steamer was reversing he could have ported and avoided the collision," the only facts which all or any of the evidence introduced by either party and bearing thereon proves or tends to prove, in addition to the facts hereinafter set forth in connection with the requested findings of fact, numbers 82, 85, 86, 87, 88, 89, 90, 91, 95, 98, 33, 35, 36, 39, 42, 52, 53, 60, 63 and the other findings and requested findings herein, are contained in the findings of the court herein.

As bearing upon the requested findings of fact numbered 3, that the Martello raised anchor at 5.30 a. m. Sunday, May 8, 1887, the only evidence introduced as aforesaid is set forth in connec-

71 tion with and bearing upon the third finding of fact and the other findings and requested findings herein in addition to the following:

DANIEL A. NASH, on behalf of the Willey, testified:

By Mr. GOODRICH:

I am secretary of the board of commissioners of pilots. I know Joseph Henderson, a pilot.

Q. Have you a regulation or custom at your office that pilots should report the steamers they take out of and into the harbor of New York?

A. They are required by a rule of the board to report all vessels; not only steamers, but all vessels.

Q. Have you a book in which there are entries on that subject?

A. Yes, sir; we are required by statute to keep such a book.

Q. Do you now produce a book called "Pilotage Book," pilot commissioners?

A. (Producing book.) This is the book of original entry; yes, sir.

Q. Will you look at that book under dates of May 6, 7, and 8, 1887, and see whether there are five entries in your handwriting?

A. Yes, sir; the first five on the page.

The following are the entries:

Date.	In or out.	Vessel.	Nativity.	Draft.	Boarded or left.	Pilot.	Boat.
May 6	In.....	B. K. Maine..	Veor.....	18	.....	Henderson.	9
7	In.....	S. S. Utopia...	Br.....	21	.....	Germand...	9
8	Out....	S. S. Martello.	Br.....	27.1	7.20 a. m..	Henderson.	9
8	In.....	S. S. Orinoco..	Br.....	18.6	.....	Henderson.	9
8	Out....	S. S. City of Chester.	Br.....	24.9	7 a. m.....	Ward.....	9

72 JOSEPH HENDERSON, on behalf of the Martello, testified:

I piloted the steamer Martello on her voyage the 7th of May last. Our yawl-boat was alongside to take me up. After we got into the yawl we rode to the station-boat. The report to Mr. Nash was made from reference to the clock aboard our boat. It was in the neighborhood of 7.20 when I got on board the "Pet." We are not particular within 20 minutes or a half hour one way or the other about the time.

As bearing upon the fourth requested finding of fact on behalf of the Martello that "the point where the Martello discharged the pilot is about 500 to 600 feet easterly of the black buoy, the usual point for discharging pilots," the evidence introduced as aforesaid, in addition to that set forth in connection with the requested findings numbers 18 and 19 and the other findings and requested findings herein, is as follows:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Where were you when the pilot left you?
A. The pilot left a little bit inside of entrance buoy—a little to the westward.

By Mr. GOODRICH:

Entrance buoy, I think, is the buoy in the Gedney channel, called the perch-and-ball buoy.

73 WILLIAM GERMAND, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did you find any other boat there in the morning?
A. The station-boat was there—No. 10.
Q. Where did the steamer stop to let Mr. Henderson and yourself off?
A. Just outside the black buoy, about opposite to the station-boat; maybe a little more to the eastward of the boat.
Q. How far from the station-boat were you let off from the steamer—from No. 10?
A. About 300 yards; in the neighborhood of that. About southeast, I suppose.
Q. The pilotage ground coming out ends at the bar?
A. Ends at the station-boat outside the bar a little.
Q. Outside the black buoy?
A. Outside the black buoy, between the black and the perch and ball.
Q. And that is your universal custom to get off there?
A. Yes; the station-boat is there.
Q. Of all pilots?
A. Yes, sir; sometimes when he is under way she is a little further out.

JOSEPH HENDERSON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Where was the steamer when you got off her?
A. She was half a mile outside the station-boat.

Q. Where is the point at which pilots always leave out-
74 ward-bound steamers?

A. Outside black buoy No. 1—that is, in daytime.
Q. And the pilotage ground ends where?
A. Outside black buoy No. 1.
Q. That is the place where the station-boat is stationed?
A. As long as she can stay there—as long as the wind will let her; when there is too much wind she sails around there.

WILLIAM WOOD, on behalf of the Martello, testified:

By Mr. THOMSON:

I am a New York and Sandy Hook pilot; have been since 1850. I was on the station-boat the day when the Martello came down. I saw the Martello come down through Gedney's channel and saw her let off Pilot Henderson. The station-boat was anchored at the usual place about 200 yards outside black buoy No. 1.

Q. Where was your boat, the Pet?

A. Inside the black buoy; probably a couple of hundred yards inside the black buoy, on a line with the station-boat.

Q. Where was the Martello when she let off Capt. Henderson?

A. I suppose she was northeast of the station-boat; she might have been northeast of the station-boat.

Q. Can you tell about how far off she was from the station-boat?

75 A. It is a long time to charge a person's memory with a distance. I should suppose in looking at the ship, as near as I can remember, about two hundred—three or four hundred feet from the station-boat.

As bearing upon the fourth finding of fact proposed in behalf of the Martello that "the steamer did not stop altogether, but slowed down to a speed of about a knot an hour," the evidence introduced as aforesaid was as follows, in addition to that stated in connection with the other findings and requested findings:

WILLIAM GERMOND, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. What rate of speed did the steamer go down the bay?

A. 9 to 10 knots.

Q. Stopped to let you off?

A. No; not still; might have been going a little; might have been going two knots.

Q. Was she going two knots?

A. I can't say; she might have only been going a knot.

Q. What I want is your memory.

A. Well, say she was going a knot.

Q. She didn't stop absolutely still?

A. No, sir; just ranging ahead a little.

76 JOSEPH HENDERSON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did the steamer stop entirely when she left you off?

A. Just stopped her engines when she got within about seven or eight lengths of the yawl-boat, going head to the wind. She lost her way considerably; probably when the yawl came alongside she was going over two knots, so that we got out comfortably without getting wet.

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did the steamer stop altogether when she discharged her pilot?

A. She may not have stopped altogether, of course, but stopped down enough——

Q. Slowed enough to let the pilot off?

A. O, yes; she might have had a knot or so.

As bearing upon the fifth finding of fact proposed on behalf of the Martello, the evidence introduced as aforesaid is hereinafter stated and set forth in connection with and bearing upon the additional findings of fact numbered 72, 73, 74, 75, 76, and the other findings and requested findings of fact.

As bearing upon the sixth finding of fact proposed on behalf of the Martello, the only evidence introduced as aforesaid is hereinafter stated and set forth in connection with and bearing upon the additional findings of fact numbered 78, 79, 80, 81, 77, in addition to the findings of the court herein and that set forth in connection with the other findings and requested findings of fact.

77

As bearing upon the seventh findings of fact proposed on behalf of the Martello, the only evidence introduced as aforesaid is hereinafter stated and set forth in connection with and bearing upon the additional findings of fact numbered 82 and the other findings and requested findings of fact in addition to the findings of the court herein.

As bearing upon the eighth finding of fact proposed on behalf of the Martello, the only testimony introduced as aforesaid is hereinafter stated and set forth in connection with and bearing upon the additional findings of fact numbered 42, 97, 102, 103, and the other findings and requested findings of fact.

As bearing upon the ninth finding of fact proposed on behalf of the Martello, the only facts which the evidence in the case proves bearing thereon are contained and stated in the findings of the court herein in addition to the following: In addition to that set forth in connection with the other findings and requested findings of fact.

78 ICHOBOD WILLEY, on behalf of the Willey, testified:

By the COURT:

Q. How long was the third whistle after your second answer?

A. I judge about the same time—a minute or a minute and a half; somewhere between that.

By Mr. GOODRICH:

Q. Did you answer that in the same way?

A. I answered that in the same way; waited until the sound blew away and then I answered.

Q. At what time, in relation to either of these three whistles, did you see the Martello?

A. I seen her when I was blowing the last one.

As bearing upon the tenth finding of fact proposed on behalf of the Martello, the facts which the evidence in the case proves or tends to prove bearing thereon are contained and stated in the findings of the court herein in addition to the evidence hereinafter stated and set forth in connection with the additional findings numbered 33, 34, 36, 37, 38, 39, 40, 41, 94, and the other findings and requested findings of fact.

As bearing upon the eleventh finding of fact proposed on behalf of the Martello, the facts which the evidence in the case proves or tends to prove as aforesaid bearing thereon are contained and stated in the findings of the court herein in addition to the evidence hereinafter stated and set forth in connection with the additional findings numbered 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62,
79 63, 65, 70, 71, 95, 98, 100, and the other findings and requested findings of fact.

As bearing upon the twelfth finding of fact proposed on behalf of the Martello, the facts which the evidence in the case proves or tends to prove as aforesaid bearing thereon are contained and stated in the findings of the court herein in addition to the evidence hereinafter stated and set forth in connection with the additional findings numbered 64, 66, 67, 68, and the other findings and requested findings of fact.

As bearing upon the thirteenth finding of fact proposed on behalf of the Martello, the facts which the evidence in the case proves or tends to prove as aforesaid are stated and set forth in the findings of the court herein in addition to the evidence hereinafter stated and set forth in connection with and bearing upon the additional findings of fact numbered 23, 24, 25, 26, 27, 28, 29, 63, 64, 66, 67, 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 93, and the other findings and requested findings of fact.

As bearing upon the fourteenth finding of fact proposed on behalf of the Martello, the facts which the evidence in the case proves or tends to prove as aforesaid are contained and stated in the findings of the court herein in addition to the evidence hereinafter stated and set forth in connection with and bearing upon the additional findings of fact numbered 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 46, 50, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 65, 69, 70, 71, 83, 84, 94, 95,
80 98, 100, 101, and the other findings and requested findings of fact.

As bearing upon the fifteenth finding of fact proposed on behalf of the Martello, the facts which the evidence in the case proves or tends to prove as aforesaid are contained and stated in the findings of the court herein in addition to the evidence hereinafter stated and set forth in connection with the additional findings of facts numbered 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 45, 46, 47, 50, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 65, 69, 70, 71, 83, 84, 85, 86, 87,

88, 89, 90, 91, 92, 94, 95, 97, 98, 100, 101, and the other findings and requested findings of fact.

As bearing upon the additional findings of fact requested on behalf of the Martello numbered 17, the evidence as aforesaid is hereinbefore set forth in connection with and bearing upon the third finding of fact of the court herein and that in connection with the other findings and requested findings.

The evidence as aforesaid bearing upon the additional findings of fact numbered 18 and 19 proposed on behalf of the Martello is hereinbefore stated and set forth in connection with and bearing upon the fourth finding of fact proposed on behalf of the Martello and the other findings and requested findings of fact.

The evidence as aforesaid bearing upon the additional findings numbered 20 proposed on behalf of the Martello is hereinbefore stated and set forth in conection with and bearing upon the
81 fourth finding requested on behalf of the Martello and the other findings and requested findings of fact.

As bearing upon the 21st additional finding requested on behalf of the Martello, the only evidence introduced as aforesaid is as follows:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. What signals have you or your telegraph for speed?
A. "Stop," "stand by," "slow ahead," "half speed ahead," "full speed."

(By Mr. THOMSON:)

Q. You used the Chadbourne dial?
A. Yes, sir.

As bearing upon the 22nd additional finding proposed om behalf of the Martello, the only evidence introduced as aforesaid is as follows:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Tell me what you did in regard to your speed—what orders you gave.
A. I put the telegraph at slow ahead.

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Slowed enough to let the pilot off?
A. Oh, yes; she might have had a knot or so.
Q. Did you proceed along after that?
A. Yes; put the engine slow ahead.

82 JOHN MAIDER, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. After you discharged the pilot at what rate in revolutions did you start up?

A. We were "slow;" about 28 to the minute after we discharged the pilot.

As bearing upon the 23rd additional finding proposed on behalf of the Martello, the only evidence introduced as aforesaid was as follows, in addition to that set forth in connection with the other findings and requested findings:

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. What is full speed with your vessel?

A. I have seen her going 13 and ½.

Q. 13 and ½ knots is what you call full speed?

A. No, sir; the average is about 11. I have seen her going 13 and ½ knots and I have seen her going less. I have seen her going 13 and ½ on the trial trip.

Q. How much have you seen off the trial trip?

A. 12 to 12 and ½.

JOHN MAIDER, for the Martello, testified:

By Mr. GOODRICH:

Q. How fast have you known your steamer to go—how many knots an hour?

A. I have known her to go 12 and I have known her to go 10.

Q. Have you known her to go 13?

A. No.

83 Q. Have you known her to go 12?

A. Yes.

Q. With how many revolutions?

A. 58.

Q. Is that the highest number you remember?

A. Yes, sir; 58.2.

The evidence as aforesaid bearing upon the 24th additional finding proposed on behalf of the Martello is set forth in connection with and bearing upon the 22nd — 23 requested finding- of fact and the other findings and requested findings of fact.

The evidence as aforesaid bearing upon the 25th additional finding of fact proposed on behalf of the Martello is set forth in connection with and bearing upon the requested findings numbered 26, 27, 28, 74, 75, 76, 77, 78, 79, 80, and 81 and the other findings and requested findings of fact.

As bearing upon the 26th additional finding proposed on behalf of the Martello, the only evidence introduced as aforesaid was as

follows, in addition to that stated and set forth in connection with and bearing upon numbers 73, 74, 75, 76, 77, 78, 79, 80, and 81 and the other findings and requested findings:

FRANCIS ELDON JENKINS, for the Martello, testified:

By Mr. THOMSON:

Q. Tell me about what rate you were going when you heard the horn.
A. We were going about 3 and ½ knots.

84 JOHN MAIDER, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Did you keep at 24? How long?
A. Till I received orders by telegraph to go full speed astern.
Q. Was that before or after the collision?
A. Before the collision.
Q. When did you get that order?
A. 7.50.

ROBERT J. NICHOLSON, for the Martello, testified:

By Mr. THOMSON:

Q. Were they slowed?
A. As slow as possible, sir.
Q. How low?
A. About 23 to 24.
Q. How long did they keep along?
A. Until 50 minutes past 7.
Q. What happened then?
A. Orders "Full speed astern."

As bearing upon the 27th additional finding of fact proposed on behalf of the Martello, the only evidence introduced as aforesaid was as follows, and that in connection with the other findings and requested findings:

JOHN MAIDER, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What did you do then?
A. I reduced them 4 revolutions to 24.
Q. Was that as slow as possible?
A. Yes, sir.
Q. What do you call as slow as possible?
A. As slow as we could steer to give the ship steering way.

85 By Mr. GOODRICH:

Q. You say that 24 is the lowest you can go?
A. Yes; not the lowest we can go, but the lowest to get steerage-way on the ship.

Q. How many revolutions do you make when simply turning over your wheel?
A. The engines just going as slow as possible?
Q. Yes.
A. About 22 to 23.
Q. Can't you go slower than that?
A. No.
Q. Why not?
A. Stop altogether.

ROBERT J. NICHOLSON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Were they slowed?
A. As slow as possible, sir.
Q. How low?
A. About 23 to 24.

As bearing upon the 28th additional finding of fact proposed on behalf of the Martello, the evidence introduced as aforesaid is as follows in addition to — stated and set forth in connection with and bearing upon the requested findings Nos. 74, 75, 76, 77, 78, 79, 80, 81, and 82 and the other findings and requested findings of fact:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

It was not very thick when the pilot left us; sufficiently clear to clear a vessel.
Q. At what rate did you proceed?
A. Well, I should think about 3 to 3½ knots.

86 CHARLES BILLINGTON, for the Martello, testified:

By Mr. GOODRICH:

Q. What is the last buoy that you saw? A black and white striped buoy?
A. Entrance buoy.
Q. What speed were you going then?
A. 3½ knots; I don't think more than that.

JAMES OGDEN, on behalf of the Martello, testified:

When the pilot left it became thicker—the weather became thicker—foggier.
Q. The steamer proceeded along?
A. Yes.
Q. At what rate of speed? How fast?
A. About three knots, as near as I can guess.

REGINALD HORNCASTLE, for the Martello, testified:

Q. Did you continue to go at the same rate from the time the pilot left you up to the time of the collision?
A. No.
Q. Was the speed of the vessel changed?
A. Yes, sir; went slower.
Q. How much slower?
A. About 3 knots to 3½ knots an hour.
Q. At what rate was she going, do you suppose, before you gave the order?
A. Perhaps 4, or perhaps a little over.

As bearing upon the twenty-ninth finding of fact proposed on behalf of the Martello, the evidence introduced as aforesaid is stated and set forth in connection with and bearing upon the requested findings numbered 73, 74, 75, 76, 77, 78, 79, 80, and 81, and
87 the other findings and requested findings of fact.

As bearing upon the 33 and 34 findings of fact proposed on behalf of the Martello, the evidence introduced as aforesaid is stated and set forth in connection with and bearing upon the requested findings of fact numbers 36, 37, 38, 39, 40, 82, 94, 97, 101, and in the findings of the court herein and the other findings and requested findings of fact.

As bearing upon the 36th finding proposed on behalf of the Martello, the only evidence introduced as aforesaid is as follows in addition to that set forth with the other findings and requested findings of fact:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. Did the vessel make more speed before you took off some of the sails at seven o'clock than she did before that?
A. I should say that there wouldn't be much difference; as the wind increased a little I took sails off. I hauled up the foresail at 7 a. m., because it freshened more and I had more speed than I needed with it on.

As bearing upon the 37th proposed finding of fact on behalf of the Martello, the facts which the evidence in the case proves or tends to prove are stated in the findings of the court herein in addition to the following, and the evidence stated in connection with the other findings and requested findings of fact:

88 ICHABOD WILLEY, for the Willey, testified:

By Mr. GOODRICH:

The Willey originally had 3,182 yards of canvass.

As bearing upon the 38th and 39th, 40 and 41st proposed findings of fact on behalf of the Martello, the only evidence introduced

as aforesaid was as follows, in addition to the facts contained and stated in the findings of the court herein:

ICHABOD WILLEY, for the Willey, testified:

By Mr. GOODRICH:

Q. How much speed can your vessel make with all her sails set?
A. She is a good ten-knot vessel, loaded, or twelve, light, in a nice set of ballast.
Q. What was the force of the wind between 7 and 8 o'clock?
A. 5 or 6 knot breeze for all sail.
Q. Could you have taken off a single sail or reefed a sail that you had set between seven and eight and had steerage-way on your vessel?
A. I could not and have command of the vessel, as I could steer her, tack, wear, or handle the vessel.

As bearing upon the 42d proposed finding of fact on behalf of the Martello, the only evidence introduced in addition to that stated and set forth in the findings of the court herein and that set forth in connection with the requested findings Nos. 96, 97, 101, 102, 103, and the other findings and requested findings of fact was as follows:

89 FRANCIS ELDON JENKINS, for the Martello, testified:

By Mr. GOODRICH:

Q. Could you locate the place of collision if you had a chart?
A. Oh, yes, sir.

(The witness makes with a red pencil on a chart produced of the bay and harbor of New York, U. S. Coast and Geodetic Survey.)
Take in chart.

JOHN WOLFF, on behalf of the Martello, testified:

By Mr. THOMSON:

I am a New York and Sandy Hook pilot. I have been a Sandy Hook pilot since 1854.
Q. Do you remember where you were on the morning of May 8th last—Sunday morning—the morning of the collision between the Martello and the barkentine Willey?
A. I was, as near as I can judge, north of the light-ship.
Q. How far from the light-ship, according to your best judgment?
A. We could hear the bell, and heard it, too, just before the collision took place.
Q. How far did you judge, for that or any other reason, you were north?
A. It might have been, perhaps, a couple of miles. We was laying with the head to the south of east, and I think, as near as I can remember, the wind was about east-northeast, and we heard a num-

ber of steamers caning off. This last steamer caning off—she was bearing about west of us, as near as I could tell by our compass, coming right at us. I hove my boat about, with my head to the north, so that she would get out of his way. We heard a crash, and I said, "That steamer has struck something." I hove
90 my boat about, and sung out to the boys who were getting breakfast to help me get the boat about quick, to see if anybody might be overboard, to save them. We steered to the direction, and in a few minutes I saw a steamer, and barkentine under his bow.

Q. What steamer was it?

A. The steamer Martello. I went aboard the ship, this steamer, and the hawser was then out, and, whether it was fastened to the steamer or not, they got the hawser out and we started ahead very slow with the steamer to tow this barkentine. The light-ship's bell was about south of us then, for we heard it, and we had our helm hard-a-starboard, going very slow.

Q. Were these vessels then remaining stationary?

A. Yes, sir. We hadn't got around yet with the head to the westward; we only got around as far as the head south.

By the COURT:

Q. Did you stay on the steamer?

A. I stayed on the steamer; I was pilot of the steamer then. As we had our helm hard-a-port, trying to get her head to the westward, we steered in to the westward until we shoaled our water to twelve fathoms, I think, and we dropped our anchor, and when it lit up we found that was about northeast from the Scotland light-ship, in twelve fathoms of water.

By Mr. THOMSON:

Q. How far from the Scotland light-ship?

A. I think it was about two miles.

By the COURT: How much distance had you gone over, do
91 you think, before you came to anchor in twelve fathoms?

A. We might have gone, I suppose, two miles.

Q. Do you know the direction that you made?

A. As near as I can remember, about west, northwest, or west by north, I think; it took us a good while before we got our heads around to the westward.

By Mr. THOMSON:

Q. You got her head around by way of the southward, didn't you?

A. Yes, sir.

As bearing upon the forty-third finding of fact proposed on behalf of the Martello, the evidence introduced as aforesaid was as follows, in addition to that stated in connection with the other findings and requested findings of fact:

ICHABOD WILLEY, for the Willey, testified:

By Mr. THOMSON:

Q. Did it occur to your mind when you heard that whistle that that was an outward-bound steamer from New York?
A. It occurred to me that she might be. I heard two before at the southward of me.
Q. Did it occur to you if she was outward bound she would be sailing just about east?
A. British steamers would be steering to the eastward. I supposed if she was coming there she would be an English steamer coming in that direction; our southern-bound steamers *is* more American steamers.

By the COURT:

Q. Do you mean you were farther to the eastward than
92 the ordinary course of southern ships?
A. Yes, sir; they would go in nearer to Long Branch.
Q. They wouldn't go anywheres near the light-ship?
A. No, sir.

JOHN C. WOLFF, for the Martello, testified:

By Mr. THOMSON:

We was laying with the head to the south of east and we heard a number of steamers coming off.
Q. When you say coming off you mean——
A. Bound to the eastward.
Q. Had you heard the whistle of steamers preceding the Martello?
A. Yes, sir. I don't know how many, but I should say some three or four.
Q. When you were remaining in substantially the same place?
A. Yes, sir.

As bearing upon the findings of fact proposed of the Martello numbered 45, 46, and 47, the evidence introduced as aforesaid is stated in connection with and as bearing upon the proposed findings numbered 43, 85, 86, 87, 88, 90, and the other findings and requested findings of fact, and in the findings of the court herein.

As bearing upon the finding of fact numbered 49, the evidence introduced as aforesaid is stated in the findings of the court
93 herein, and in connection with the other findings and requested findings of fact, in addition to the following:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. THOMSON:

Q. Is the nineteenth sailing article compulsory upon navigators?
A. No; but it might save collision.

As bearing upon the finding of fact requested on behalf of the Martello numbered 50, the evidence introduced as aforesaid is stated in the findings of the court herein and in connection with the other findings and requested findings of fact, in addition to the following:

ICHABOD WILLEY, for the Willey, testified:

By Mr. THOMSON:

Q. Did it occur to your mind that if you luffed you might have avoided a collision?

A. Yes; and I should if he had given me the proper whistles to let me know what he was going to do.

Q. After you saw him, suppose he had changed his direction and put his helm either to port or starboard, how many points could he have changed his direction in the interval between the time you saw him and when the collision occurred?

A. If he had done either and given me his whistle there would have been no collision. When he reversed his engine had he given me three short blasts I would have known he was reversed
94 and I would have ported my wheel and we never would have met each other.

Q. If he had given you three whistles under the nineteenth article how would you judge from that he would put his helm?

A. I wouldn't care anything about his helm. I would know with full reverse the ship wouldn't alter her course but a little, and I would be safe in porting my wheel.

Q. You know, do you, that if he had reversed at full speed that is all you would have cared for?

A. If he had let me know that there would have been no collision. I would have ported my wheel then, and instead of his hitting me just forward he wouldn't have hit me at all.

Q. But don't you know this, that it is his duty to reverse full speed when he is in danger of a collision?

A. I know it is if he knows he will save a collision by it.

Q. What figure in your mind does the reversing cut?

A. What do you mean, in the steering of the ship?

Q. In regard to your consideration at the time as to whether you should have luffed or not.

A. I say if I had known he had reversed I should have ported my wheel, because I would know she couldn't alter her course a great deal under a full speed astern.

Q. But you didn't know at the time it was his duty to reverse?

A. I can't say it was when he could have cleared me without reversing.

95 Q. You don't think it was his duty to have reversed under the circumstances?

A. Not without letting me know it.

Q. And those were the views you entertained at the time, were they?

A. Yes, sir.

As bearing upon the finding of fact requested on behalf of the Martello numbered 52, the evidence introduced as aforesaid is as follows, in addition to that stated in connection with the other findings and requested findings of fact:

ICHABOD WILLEY, for the Willey, testified:

By Mr. THOMSON:

Q. How long after you answered his first and second whistle was it that you heard another whistle from him?
A. About a minute and a half; from a minute to a minute and a half.
Q. How long did you figure it was between the time you first heard his whistle and the collision?
A. I should say about five minutes.

As bearing upon the findings of fact requested on behalf of the Martello numbered 53, 54, and 55, the evidence introduced as aforesaid, in addition to that stated in connection with the other findings and requested findings of fact herein, is as follows:

96 FRANCIS ELDON JENKINS, in behalf of the Martello, testified:

By Mr. THOMSON:

Q. From the time you first saw the barkentine tell us as well as you can what opportunity there was on either side to avoid the collision.
A. The only opportunity was for him to have put his helm down and bring her up in the wind. If he had done that I don't think we would have collided with such great force.
Q. If he had luffed?
A. If he had put his helm down.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON;

If he had luffed and put his helm over my opinion is that he would have gone into the wind and lost all her way, and the damage would have been very slight.
Q. Even at that time you thought a collision necessary?
A. If that had been done I am not as sure whether there would, but I fancy she would have dropped alongside.

JAMES OGDEN, on behalf of the Martello, testified:

Q. When you first saw her what could have been done to have avoided a collision; have been avoided as well as you can state?
A. I can say, sir, what could have been done to avoid it. If he had luffed up more I think myself he would have crossed our bow.

97 REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. After you saw the barkentine what was there that the steamer could have done to avoid the collision?

A. Nothing at all; nothing any more than we was doing.

Q. What could the barkentine have done?

A. Might have luffed, thrown herself in the wind, or gone about.

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. THOMSON:

Q. Did it occur to your mind that if you luffed you might have avoided a collision?

A. Yes; and I should if he had given me the proper whistles to know what he was going to do.

As bearing upon the finding of fact requested on behalf of the Martello numbered 57, the evidence introduced as aforesaid is stated in the findings of the court herein and in connection with the requested findings of fact numbered 42 and 37 and the other findings and requested findings of fact.

As bearing upon the finding of fact requested on behalf of the Martello numbered 58, the evidence introduced as aforesaid is stated in the findings of the court herein and in connection with the requested findings Nos. 37, 42, and 57 and the other findings and requested findings of fact.

98 As bearing upon the finding of fact requested on behalf of the Martello numbered 59, the evidence introduced as aforesaid is stated in the findings of the court herein and in connection with and as bearing upon the findings requested numbered 54 and 55 and the other findings and requested findings of fact.

As bearing upon the finding of fact numbered 60, proposed on behalf of the Martello, the evidence introduced as aforesaid is stated in the findings of the court herein, and also in connection with and as bearing upon the findings numbered 54, 55, and 59, and the other findings and requested findings, in addition to the following:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. THOMSON:

Q. After you saw him, suppose he had changed his direction and put his helm either to port or starboard, how many points could he have changed his direction in the interval between the time you saw him and when the collision occurred?

A. If he had done either and given me his whistle there would have been no collision. When he reversed his engine had he given me three short blasts I would have known he was reversed and I would have ported my wheel and we never would have met each other.

Q. What figure in your mind does the reversing cut?

A. What do you mean—in the steering of the ship?

99 Q. In regard to your consideration at the time as to whether you should have luffed or not?

A. I say if I had known he had reversed I should have ported my wheel because I would know she couldn't alter her course a great deal under a full speed astern.

Q. But you didn't know at the time it was his duty to reverse?

A. I can't say it was when he could have cleared me without reversing.

Q. You don't think it was his duty to have reversed under the circumstances?

A. Not without letting me know it.

Q. And those were the views you entertained at the time, were they?

A. Yes, sir.

As bearing upon the finding of fact requested on behalf of the Martello numbered 61, the evidence introduced as aforesaid is stated and set forth in connection with the requested findings numbered 54, 55, 59, and 60 and the other findings and requested findings and in the findings of the court herein.

As bearing upon the finding of fact as requested on behalf of the Martello numbered 62, the evidence introduced as aforesaid is stated and set forth in connection with and as bearing upon the requested findings numbered 54, 55, 59, 60, and 61 and the other findings and requested findings of fact and in the findings of the court herein.

100 As bearing upon the finding of fact requested on behalf of the Martello numbered 63, the evidence introduced as aforesaid is stated and set forth in connection with the requested findings numbered 53, 54, 55, 59, 60, and 61 and 62 and the other findings and requested findings of fact as follows:

FRANCIS ELDON JENKINS, for the Martello, testified:

By Mr. THOMSON:

Q. What possibility was there on your side to have avoided it by any movement?

A. No movement at all, sir, because we went full speed astern; the only thing we could do.

Q. And held your helm hard-a-port?

A. Yes, sir; the helm hard-a-port.

Q. When you saw the barkentine it was too late for you to change the helm any way, if you wanted to?

A. If we had put the helm starboard we would have had to cross her bow, and she would have hit us in the middle.

REGINALD HORNCASTLE, for the Martello, testified:

By Mr. THOMSON:

Q. After you saw the barkentine what was there that the steamer could have done to avoid the collision?

A. Nothing at all; nothing any more than we were doing.

101 As bearing upon the finding of fact requested on behalf of the Martello numbered 64, the evidence introduced as aforesaid is stated and set forth in connection with the findings numbered 23, 24, 26, 27, 28, 66, 74, 75, 76, 77, 78, 79, 80, 81, 94, and in the findings of the court herein, and also as follows, in addition to that stated in connection with the other findings and requested findings of fact:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What rate had you become reduced to when the collision actually took place?

A. We had very little way on; I suppose possibly not more than a knot; that at the outside. I couldn't say exactly, because they were standing by the engine and put them full speed astern immediately.

ALFRED R. WOLFF, for the Martello, testified:

By Mr. GOODRICH:

Q. Can you form any judgment from your mathematical scientific knowledge as to the speed of the steamer causing the effect which you saw on the barkentine?

A. Yes, sir.

Q. What is your judgment?

A. I should certainly say, in my judgment, the speed would not be more than one knot, and that it could not have been more than two knots per hour. That is my best judgment in the matter.

102 As bearing upon the finding of fact requested on behalf of the Martello numbered 65, the only evidence introduced as aforesaid is stated and set forth in the findings of the court herein and in connection with and as bearing upon the requested findings numbered 59, 61, 62 and the other findings and requested findings of fact.

As bearing upon the finding of fact requested on behalf of the Martello numbered 66, the only evidence introduced as aforesaid is as follows:

ALFRED R. WOLFF, on behalf of the Martello, testified:

By Mr. THOMSON:

I am a consulting engineer. My specialty is steam engineering. I graduated from Stevens' Institute of Technology in 1876. After

that I entered the office of Mr. Charles E. Emory, at that time connected with the Treasury Department as consulting engineer for the coast survey and revenue marine service in the architect's department, and I was his assistant for several years. Then I entered the revenue marine service in order to gain practical experience and was at sea; made a trip to Alaska and the Arctic ocean. After that, in 1880, I settled down in this city to the practice of engineering, which I have carried on since. I was at sea as assistant engineer on the steamer Corwin and the steamer Rush, Government vessels.

Q. Have you made a study of forces and collisions?

A. Yes, sir; a subject of forces really is the main part of
103 mechanical engineering, and I deal in that constantly.

Q. Will you be good enough to state also whether you have given attention to the consideration to the extent of the blow necessary to produce the damage which you see exhibited in these photographs and which was described by those two witnesses?

A. I have.

Q. Will you be good enough to state what speed of the steamer Martello was sufficient, in your judgment as an expert, to produce that impingement and damage?

A. Under what assumed condition of speed as to the barkentine?

Q. We will assume she was going at from four to five knots an hour at the time; that she was laden with lumber, as stated by the witness; that she had 433,000 feet of lumber on board.

A. Under those conditions and with the understanding that the weight of the Martello and the cargo combined, because that enters the question, was in the neighborhood of 7,500 tons, and with the barkentine going at four knots an hour, I should say the injury shown could have been produced by a speed of one knot per hour on the part of the Martello.

Q. Be kind enough to give your reasons for this and make any statement that you please in regard to the formula by which you make your calculations; make your statement in full.

A. The Martello impinging on the barkentine at an angle of about 45 degrees, the effect of the four-knot speed of the barkentine would be to have a component in the direction of motion of the Martello equivalent to about 2.83 knots per hour, so that the effect
of the blow from a mechanical point of view would be the
104 same as if the barkentine was at rest and she were being struck by the steamer coming at the rate of 3.83 knots an hour.

Allowing 2.83 as this component and considering the relative mass of the two vessels to be, with their cargo, *to be* in the neighborhood of one to two, we can consider an added velocity to the velocity of the impinging steamer, the Montello, to be about 1.4, or, in other words, that the Martello strikes the barkentine with a force of 2.4, and that the barkentine is at rest. This is simply with the idea of figuring up the force of the blow.

Q. What do you assume or have you made an assumption as yet

of the weight of the barkentine with her cargo? Did I understand you that you assumed it would be half of the weight of the steamer?

A. One-half of 7,500 tons, if it was that—that is, on that supposition.

By the COURT: You would do that by figuring the square of the velocity into the mass to represent the force?

A. One-half the mass into the square of the velocity.

Q. You take the mass of the barkentine into the square of the velocity and then take that fraction and divide that by the mass of the steamer and then take the square root?

A. That is correct.

Q. And that square root would be what you would add to the steamer's speed to represent the transfer of the bark's motion to the steamer?

A. Of course; that is it. Now, assuming, to show the force of the blow, that this steamer only struck the vessel with a two-knot blow, that is the same as if the barkentine were stationary.
105 In that case the force would equal in the neighborhood of three million foot-pounds of energy which is derived from the formula one-half $(\frac{1}{2})$ M. V^2.

Q. What is a foot-pound?

A. Simply the energy created by one pound falling one foot for the first second.

By Mr. THOMSON: If we assumed this would strike thirty square inches we would have a million foot-pounds per second for each of the impinged square inches; that would be the energy represented on each square inch. Now, the resistance of wood—of oak—to a transverse strain—the total resistance, the crushing resistance—is about 500 pounds per square inch, and on this assumption we would be able to go through two thousand square inches of timber. After the steamer's stern has entered once—penetrated in—the effect would be then to get a leverage on the timbers, which it would rupture and displace, and then the force required would be comparatively slight to break asunder the rest of the vessel.

The main resisting force really is the timber at where it is struck originally by the stern.

By the COURT:

Q. Won't you explain your method of arriving at this?

A. I have three million foot-pounds of energy to dispose of. Now, assuming that this stern struck thirty square inches of superficial area, then on each square inch of superficial area the effect would be one hundred thousand pounds. I am simply speaking of the force
106 which comes on each square inch of surface. Now, I say that with five hundred pounds per square inch of the cross-sectional resistance of timber this would go through two hundred square inches of cross-sectional area.

By Mr. THOMSON:

Q. State again the number of foot-pounds the blow would have been equivalent to if the speed were one knot an hour.

A. That is, under all these circumstances, three million foot-pounds per second.

Q. Now, suppose the weight of the barkentine to have been a smaller proportion of the weight of the steamer or a larger proportion of it, can you give us a formula by which we ourselves can work out the difference in result?

A. You find the component of the velocity of the barkentine in the direction of the steamer's force. To do this you must take the square root of one-half the square of the barkentine's velocity; then you take this velocity thus attained, square it and multiply it by the mass of the barkentine, and then divide it by the mass of the steamer; the square root of the result shall be added to the velocity of the steamer; that gives the velocity of the steamer; then you multiply one-half the mass into the square of the given velocity thus attained and you have the foot-pounds of energy exerted by the steamer and its blow.

I find that allowing the barkentine to weigh one-half the weight of the steamer, both with their cargo, and allowing the barkentine to go at a speed of four knots per hour, the two impinging at an angle of forty-five dregrees, I find that the stored energy of the barkentine when transferred into the weight and the direc-
107 tion of the steamer will equal a two-knot speed of the weight of the steamer. I find as the result of this that the penetrated effect of the weight of the steamer taken at 7,500 tons would be for a one-knot speed 6,704,586 foot-pounds, the total impulse which it exerts. If the speed of the steamer were taken at two knots its penetrating effect under the same conditions would be 11,919,224 foot-pounds per second. For four knots it is 26,818,344 foot-pounds per second. At five knots it is 36,502,746 foot-pounds per second. At six-knot speed of steamer it is 47,677,056 foot-pounds per second, and at seven knots per hour it is 60,341,274 foot-pounds per second. Assuming the steamer to have a speed of one knot per hour, if the blow was distributed on a superficial area of the stern of 30 square inches, at each square inch of impact the penetrating effect per second would be 6,704,586 divided by 30, or 223,152 foot-pounds per second. Therefore, since the strength of good timber subjected to the transverse strain is about 500 pounds per square inch, cross-sectional area, each square inch of superficial area of the penetrating stern would under the conditions assumed have the capacity to go through 446 cross-sectional square inches of timber.

As bearing upon the findings of fact numbered 67 and 68, proposed on behalf of the Martello, the only evidence introduced as aforesaid is stated in the finding of the court herein, and also in connection with the requested findings numbered 64 and 66 and the other findings and requested findings of fact.

108 As bearing upon the finding of fact numbered 69, requested

on behalf of the Martello, the only facts which the evidence introduced as aforesaid proves or tends to prove created in the findings of the court herein and in connection with the finding- numbered 26, 27, 28, 33, 35, 37, 43, 82, 83, 84, 85, 86, 87, 88, 89, and 90, 94, 97, 101, and the other findings and requested findings of fact.

As bearing upon the finding of fact numbered 70, requested on behalf of the Martello, the only facts which the evidence introduced as aforesaid proves or tends to prove are stated in the findings of the court herein and in connection with the requested findings numbered 53, 54, 55, and 71 and the other findings and requested findings of fact.

As bearing upon the 71st finding of fact, requested on behalf of the Martello, the facts which the evidence introduced as aforesaid proves or tends to prove are stated in the findings of the court herein and in connection with the requested findings numbered 43, 52, 59, 60, and 61 and the exceptions to the findings of the court herein and the other findings and requested findings of fact, in addition to the following:

109 CHARLES COBB, on behalf of the Willey, testified:

By Mr. DEADY:

Q. Where was the captain?
A. The captain was aft.
Q. What was he doing?
A. He was walking and blowing the horn.
Q. How was he blowing the horn?
A. Blowing one blast.
Q. How often?
A. Every minute and a half or two minutes.

By Mr. THOMSON:

Q. He had a fog-horn, did he?
A. Yes, sir.
Q. What kind of a fog-horn?
A. A tin fog-horn.
Q. How long had he been blowing that fog-horn?
A. He had been blowing it all day—all the morning.

MIKAL LUDVIGSEN, on behalf of the Willey, testified:

By Mr. DEADY:

Q. What was the captain doing?
A. He was blowing the horn, sir.
Q. How was he blowing it?
A. He was blowing one blast, sir.

By Mr. THOMSON:

Q. How did the captain blow his fog-horn—how long between?
A. A minute and a half or two minutes, I should think.

By Mr. DEADY:

Q. Hadn't the fog-horn been blowing all the morning?
A. Yes, sir.

110 JOHANN MATHLIN, for the Willey, testified:

By Mr. DEADY:

He was blowing the fog-horn—the captain was blowing.
Q. How often was he blowing it?
A. Every minute.
Q. How would he blow?
A. One.

JOSEPH TRATER, for the Willey, testified:

By Mr. DEADY:

Yes, sir; I hear her horn blowing.
Q. Who was blowing it?
A. The captain, he was blowing it.
Q. And how often was he blowing it?
A. Well, he was blowing it about once a minute, as near as I can judge.
Q. How many blasts would he blow?
A. One blast.

By Mr. THOMSON:

Q. You heard your skipper blowing his horn, did you?
A. Yes, sir.
Q. Did he keep blowing his horn?
A. Yes, sir; he kept his horn agoing.
Q. Did he keep it agoing after you saw the steamer?
A. Yes, sir.
Q. He kept blowing his horn?
A. Yes, sir.
Q. Right up to the time of the collision?
A. Yes, sir.

JOSEPH GREEN, on behalf of the Martello, testified:

By Mr. DEADY:

Q. Did you hear anything from your vessel?
A. O, yes.
Q. What?
A. A fog-horn.
111 Q. Was the fog-horn blowing?
A. Yes, sir; at intervals, I suppose, of a minute to a minute and a half.
Q. How many blasts would be blown at a time?
A. One.
Q. And before you went below was your fog-horn blowing?
A. Yes, sir.

Q. Did you hear the fog-horn on your vessel while you were in the cabin?
A. Yes, sir.
Q. Was it blowing all the time?
A. Yes, sir; blowing all the time; steady blowing.

MARTIN ANDERSON, for the Willey, testified:

By Mr. DEADY:

Q. Had you heard our horn blowing that morning?
A. Yes, sir.

ICHABOD WILLEY, on benalf of the Willey, testified:

By Mr. GOODRICH:

Q. Did you have a horn aboard?
A. Yes; three of them. I heard her (the Martello) give one whistle.
Q. What did you do then?
A. I took the horn and answered it.
Q. How long before that whistle had you sounded your horn?
A. The mate had been sounding it long before I noticed his whistle coming too near; he sounded every minute or minute and a half—such a matter.
Q. When you heard the whistle of the Martello——
A. I took the horn and sounded myself when I found she was coming too near.
112 Q. Did you hear another whistle?
A. Yes, sir.
Q. Then, what did you do?
A. I waited until the sound had blew away a little and then I answered again.

By the COURT:

Q. Did you sound your blast immediately?
A. As soon as I waited a bit for his sound to blow away.
Q. As soon as you heard the first whistle did you blow immediately?
A. I just waited two or three seconds for his sound to go away like, and then I answered him.
Q. In two or three seconds?
A. Yes, sir.
Q. How long was that after you had blown that you heard the second whistle?
A. I judge, a minute or so; minute and a half, according to my judgment.
Q. How far forward of the taffrail were you standing while you were sounding the horn?
A. Probably 10 feet; 10 or 12 feet, probably.
Q. At the time you was blowing these three separate blasts of

the horn and at the time the Martello came in sight, what was the weather as to fog?

A. The weather was so you could see about a quarter of a mile; not so very thick.

By the COURT:

Q. While you were blowing in answer to these whistles was the mate forward, also blowing his horn?

A. The mate was aft with me.

113 By Mr. GOODRICH:

Q. The mate was not blowing the horn the same time you were, was he?

A. No, sir; there was only one horn blowing. When I found the steamer was coming too near I took the horn from the mate and blew it myself.

Q. How far do you suppose that horn could be heard?

A. I should judge half a mile, moderate weather like we had it.

Q. An ordinary horn that is in use aboard vessels, isn't it?

A. Yes, sir.

By Mr. THOMSON:

Q. How often did you sound your horn? The mate was sounding the horn, wasn't he?

A. I was sounding it the last three blasts.

Q. And before that the mate was?

A. Yes, sir.

Q. Did you sound it when you took it in your hand by any rule or simply following the steamer's whistle?

A. After I took it I answered him every time he blew, after waiting a few seconds.

Q. Did you answer his third whistle?

A. I answered three times.

Q. With your horn?

A. Yes, sir; I did.

Q. Do you know what the rule is in regard to a sailing vessel when in a fog she hears the whistle of a steamer? What is the rule in regard to her course?

A. We are supposed to keep our course. That is the rule I have been taught, unless I can avoid a collision.

114 Q. Did you at the time understand that rule to be inflexible; that under any circumstances she should keep her course?

A. No, sir; if I could avoid an immediate collision I am to change my course.

Q. You had not any well-defined idea where the sound of the whistle came from?

A. Yes; I thought it was coming near all the time.

Q. But I mean in what direction—whether north or south of you.

A. It sounded somewheres to the northwest of us.

Q. Did it occur to your mind that if you luffed you might have avoided a collision?

A. Yes; and I should if he had given me the proper whistles to know what he was going to do.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. How far do you think you could hear that noise that you took to be a fog-horn?

A. I couldn't say. It was an ordinary fog-horn.

Q. How do you know?

A. I could see it in the man's hand.

Q. Whose hand?

A. I don't know.

Q. Was it the captain?

A. I couldn't say, sir.

Q. How many men did you see on the barkentine?

A. I didn't take notice of more than one. He was leaning against the house.

115 As bearing upon the 72d finding of fact requested on behalf of the Martello, the only evidence introduced as aforesaid is as follows, in addition to that stated in connection with the other findings and requested findings:

FRANCIS ELDON JENKINS, for the Martello, testified:

By Mr. THOMSON:

I was born in Dublin; my age is 58; I have followed the sea since 1846. I have been in the steam service since 1871 and a master mariner since 1856. I have been in command of the Martello since she was new (1884). I have been in the service of the Wilson line since 1870, and am the senior master of that line in this trade—the New York trade.

Q. Where were you when the pilot left you?

A. The pilot left a little bit inside of entrance buoy—a little to the westward.

Q. At what rate did you proceed?

A. At what rate of speed?

Q. Yes.

A. Well, I should think about 3 to $3\frac{1}{2}$ knots.

JOHN MAIDER, for the Martello, testified:

By Mr. THOMSON:

I am 26 years old and am an engineer. I have been and engineer at sea five years, and a second engineer 2 years and two months. I joined the Martello about January (1887). I have been in the Wilson line 4 years last February. I was on the Mar-
116 tello at the time of the collision with the barkentine.

Q. What rate had you been running before you stopped for the pilot to leave? How many revolutions?

A. Shortly before we discharged the pilot we were going full speed.

Q. After you discharged the pilot at what rate in revolutions did you start up?

A. We were slow; about 28 to the minute after we discharged the pilot.

ROBERT J. NICHOLSON, on behalf of the Martello, testified:

By Mr. THOMSON:

I am the fifth engineer on the Martello. I was on her as fifth engineer at the time of the collision. I was on watch with the second engineer.

Q. Do you know the revolutions immediately after the pilot left?

A. I think we would be making 26, as near as I know, sir; not more.

As bearing upon the 73d finding of fact requested on behalf of the Martello, the evidence introduced as aforesaid is as follows, in addition to that stated under the other findings and requested findings of fact:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. How did the weather continue?

A. The weather was clear till the pilot left. We could see everything—see the buoys.

117 Q. You proceeded on the voyage?

A. Proceeded on the voyage.

Q. How was the weather?

A. The weather got thick.

CHARLES BILLINGTON, on behalf of the Martello, testified:

Q. How was it when the pilot left you?

A. When the pilot left, sir, it was sufficiently clear to see the buoys, but it came on thick immediately after.

Q. How thick?

A. It got denser as we got a little further along.

By Mr. GOODRICH:

It was foggy; it came on immediately after the pilot left.

JAMES OGDEN, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. When the pilot left how did the weather become?

A. It became thicker; the weather became thicker, foggier.

By Mr. GOODRICH:

Q. How long after the pilot left you did you run before the weather became more hazy?
A. Very short time.

REGINALD HORNCSATLE, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. Slowed enough to let the pilot off?
A. Oh, yes; she might have had a knot or so.
Q. How was the weather?
A. It came down thick directly he left.

118 By Mr. GOODRICH:

The fog came down immediately the pilot left.

As bearing upon the 74th finding of fact requested on behalf of the Martello, the only evidence introduced as aforesaid is as follows:

FRANCIS ELDON JENKINS testified:

By Mr. THOMSON:

Q. Tell me what you did in regard to your speed; what orders you gave.
A. I put the telegraph at slow ahead, and then a few minutes after I sent the third mate down to the engineer to the engine-room to tell him it was foggy, to go quite slow.

By Mr. GOODRICH:

Q. How fast were you going at that time?
A. 3½ knots.
Q. That was at entrance buoy?
A. Yes.
Q. You continued at that rate of speed until you heard the Willey?
A. I think slower because I sent the third officer to the engineer to say it was foggy, to go slow; to say go quite slow.
Q. Was it before or after you heard the fog-horn?
A. That was just when the pilot left us.
Q. That means about 3 to 3½ knots?
A. Yes, sir.
Q. Then you had been going a little faster before that?
A. We might have been, but to be on the safe side in case the engineer might not think there was a fog I sent the man down to the engine-room to tell him.
Q. Under what speed were you going?
A. Slow ahead.
Q. How many miles does that carry you in slack water?
A. About 3½ to 4 knots; might be 3½.

119 JOHN MAIDER.

By Mr. THOMSON:

Q. How long did you keep at 28?
A. Till about 7.20, I think; somewhere near about 7.20. The third mate came there and gave me orders to let the engines go as slow as possible.

ROBERT J. NICHOLSON, for the Martello, testified:

By Mr. THOMSON:

Q. What happened, then, after that; how long did they keep on making that rate that you speak of?
A. Until about quarter past 7, as I remember. The third mate came down and ordered the engines to be slowed down.

REGINALD HORNCASTLE, for the Martello, testified:

By Mr. THOMSON:

Q. Did you continue to go at the same rate from the time the pilot left you up to the time of the collision?
A. No.
Q. In what respect did it differ?
A. We were going slow ahead by the engine. I went down and told the engineer, by the captain's orders, to let her go as slow as possible; the fog was very thick.
Q. Who did that; you?
A. Yes, sir; I did that.
Q. When was that?
A. About twenty minutes past 7.
Q. The directions were to go slower than they were going?
A. Slow as they possibly could.

120 By Mr. GOODRICH:

Q. Do you know what time you took the order to the engineer to go dead slow?
A. I should think about 20 minutes past 7.

ARTHUR BRADLEY STOUT, for the Martello, testified:

By Mr. THOMSON:

Q. Do you know anything about the ship's being slowed up after she left the pilot?
A. Yes, sir; the telegraph was set slow. I heard the captain tell the third mate to go down to the engine-room and tell them to put it slow.

As bearing upon the 75th, 76, 77, 78, 79, 80, and 81 findings requested on behalf of the Martello, the only evidence introduced as aforesaid is as follows, in addition to that stated in connection with and bearing upon the other findings and requested findings of fact:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. How fast were you going at that time?
A. 3 and ½ knots.
Q. You continued at that rate of speed until you heard the Willey?
A. I think slower, because I sent the third officer to the engineer to say it was foggy; to go slow; to say, go quite slow.

121 CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. What is full speed with your vessel?
A. I have seen her going 13½.
Q. What do you call he- full speed on the telegraphic signal?
A. That is the usual speed—about so many pounds of steam; I don't know how many pounds.
Q. 13½ knots is what you call full speed?
A. No, sir; the average is about 11. I have seen her going 13½ knots and I have seen her going less.
Q. You have seen her going 13½?
A. I have.
Q. In ordinary sailing?
A. No; on the trial trip.
Q. Never since?
A. No, sir; never since the trial trip.
Q. How much have you seen off the trial trip?
A. 12 to 12½.

JOHN MAIDER, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What did you do then?
A. I reduced them 4 revolutions to 24.
Q. Was that as slow as possible?
A. Yes, sir.
Q. What do you call as slow as possible?
A. As slow as we could steer to give the ship steering-way.
Q. Did you keep at 24 how long?
A. Till I received orders by telegraph to go full speed astern.
Q. Was that before or after the collision?
A. Before the collision.
Q. When did you get that order?
A. 7.50.

122 By Mr. GOODRICH:

Q. How fast have you known your steamer to go?
A. By engines or by the ship?
Q. How many knots an hour?

A. It depends upon the weather. I have known her to go 12 and I have known her to go 10.
Q. Have you known her to go 13?
A. No.
Q. Have you known her to go 12?
A. Yes.
Q. With how many revolutions?
A. 58.
Q. Is that the highest number you remember?
A. Yes, sir; 58.2.
Q. How many revolutions do you make when you are simply turning over your wheel?
A. The engine just going as slow as possible?
Q. Yes.
A. About 22 to 23.
Q. Can't you go slower than that?
A. No.
Q. Why not?
A. Stop altogether.
Q. You say that 24 is the lowest you can go?
A. Yes—not the lowest we can go, but the lowest to get steerage-way on the ship.

By Mr. THOMSON:

Q. When you speak of full speed, do you refer to full speed of the engines or full speed of the steamer?
A. Full speed of the steamer.
Q. And what is the highest, do you say—what is the highest speed of the engines that you gave there?
A. 58.2.

ROBERT J. NICHOLSON, on behalf of the Martello, testified:

By Mr. THOMSON:

123 Q. What happened then—after that? How long did they keep on making that rate that you speak of?
A. Until a quarter past 7, as I remember. The third mate came down and ordered the engines to be slowed down.
Q. Were they slowed?
A. As slow as possible, sir.
Q. How low?
A. About 23 to 24.
Q. How long did they keep along?
A. Until 50 minutes past 7.

REGINALD HORNCASTLE, on behalf of the Martello, testified:

By Mr. THOMSON:

We were going slow ahead by the engines. I went down and told the engineer, by the captain's orders, to let her go as slow as possible. The fog was very thick.

Q. Who did that—you?
A. Yes, sir; I did that.
Q. When was that?
A. About 20 minutes past 7.
Q. The direction- were to go slower than they were going?
A. Slow as they possibly could.
Q. Was the speed of the vessel changed?
A. Yes, sir; went slower.
Q. How much slower?
A. About three knots to 3 and ½ knots an hour.

As bearing upon the 82d finding of fact requested on behalf of the Martello, the evidence introduced as aforesaid is as follows, in addition to that stated under the other findings and requested findings:

124 FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

Q. Tell me what rate you were going when you heard the horn.
A. We were going about 3 and ½ knots.
Q. What did you do?
A. I put the helm hard-a-port and put full speed astern to the telegraph.
Q. Did you see the barkentine by this time?
A. I didn't see the barkentine until after I had put the engine astern.
Q. How long before she loomed in sight to you?
A. A moment or two—a very short time.
Q. When you say a moment you mean a second or merely an instant or what?
A. Well, say about ten or twelve seconds. She appeared to be going pretty fast through the water. I couldn't say exactly, but I should think she would be about five or six knots, as far as I could judge.

CHARLES BILLINGTON, on behalf of the Martello, testified:

By Mr. THOMSON:

Q. What was done when you heard the barkentine's horn?
A. At the same time as I heard it she hove in sight, almost immediately.

By Mr. GOODRICH:

Q. That is the first hail you gave?
A. I sung out the fog-horn first, and as she came in sight I sung out, Hard-a-port.
Q. Was that the only signal you heard?
A. That is the first signal I heard.
Q. How do you know?
A. Because she hove in sight immediately.

125 REGINALD HORNCASTLE, for the Martello, testified:

By Mr. THOMSON:

Q. What was the first you knew of being near the barkentine?
A. The first we knew was hearing a horn; the man on the look-out reported a horn on the starboard bow.
Q. What was done then?
A. We heard one blast; immediately the mate sang out, "Hard-a-port!" He was on the forecastle-head.
Q. As soon as he halloed out that, what was done?
A. Put the helm hard-a-port, as he sung out; full speed astern at the same time.
Q. Who did?
A. The chief officer. At the same time the captain sung out, right after, "Full speed astern!" and I put my hand to the telegraph and put her over.
Q. Full speed astern?
A. Yes.
Q. This was before you saw the barkentine?
A. The mate might see her, but we couldn't see her then.
Q. It was before you saw her?
A. Yes, before.

By Mr. GOODRICH:

Q. Who saw the barque first, you or the captain?
A. Both saw it together. We were standing alongside each other.
Q. When the order to reverse was given, had you seen the barque?
A. No, I had not.

ARTHUR BRADLEY STOUT, for the Martello, testified:

126 By Mr. THOMSON:

Q. When you heard the horn, what happened then?
A. The mate, on the forecastle-head, called out, and the man on the lookout.
Q. What did they say?
A. The man on the lookout reported a fog-horn on the starboard bow, and the mate sung out, "Hard-a-port! Full speed astern!"
Q. Did you put the helm hard-a-port?
A. Yes, sir.
Q. And was anything done with reference to putting the engines full speed astern?
A. The captain immediately told the third mate to ring full speed astern.

By Mr. GOODRICH:

I could see everything on the ship as soon as she hove in sight—all her sails and the loom of the ship. She appeared to come in sight like that (illustrating) after I heard the horn.

ICHABOD WILLEY, for the Willey, testified:

By the COURT:

Just about the time I was blowing the last whistle I see him.

As bearing upon the 83d and 84th requested findings of fact on behalf of the Martello, the evidence introduced as aforesaid is stated and set forth in connection with and as bearing upon the other findings and requested findings of fact and in the findings of the court herein.

127 As bearing upon the 86th, 87, 88, 89, 90, and 91st requested findings of fact on behalf of the Martello, the evidence introduced as aforesaid, in addition to that stated in connection with and as bearing upon the other findings and requested findings, is as follows:

ICHABOD WILLEY, on behalf of the Willey, testified:

Q. Are you aware of the direction in which large steamers going out of New York sail when they get outside of the channel, out into the open sea?

A. I know they go out in an easterly direction somewheres—the European steamers.

Q. And you know that Saturday is a great day for European steamers going out of New York? Did that ever occur to you?

A. I don't know as it did; that is something I don't know much about.

Q. You didn't take that into account?

A. No, sir.

Q. You knew it was foggy the night before—the day before?

A. Yes, sir.

Q. Did it occur to your mind that steamers that were outbound on Saturday would probably be anchoring in the channel or around Sandy Hook and starting out on Sunday morning around there?

A. No, sir.

Q. You never thought of that, did you?

A. No, sir.

Q. It never occurred to your mind that you were liable to be right in the way of a large number of large steamers when you were heading northerly—that you were crossing their track?

A. It doesn't matter where we get, coming into New York.

Q. Did that occur to you?

128 A. No, sir; I wasn't thinking of it at all.

Q. You were running to the northward?

A. Yes, sir.

Q. In the neighborhood of Sandy Hook light-ship and without reference to those things at all?

A. Until I heard their whistles; then I knew there were steamers there.

Q. Did it occur to your mind when you heard that whistle that that was an outbound steamer from New York?

A. It occurred to me that she might be. I heard two before at the southward of me.

Q. Did it occur to you if she was outbound she would be sailing just about east?

A. That would depend upon where she was going.

Q. If she was going to any port in the neighborhood of England or the British channel?

A. British steamers would be steering to the eastward.

Q. Did that occur to you at that time when you heard the whistle?

A. I suppose if she was coming there she would be an English steamer, coming in that direction. Our southern-bound steamers is more American steamers.

By the COURT:

Q. What was it that gave you an impression that she was an England-bound steamer?

A. By her going out to the eastward.

Q. Because she went so far to the eastward?

A. Yes, sir; the English boats run to the eastward on their course out.

Q. Do you mean you were further to the eastward than the ordinary course of southern-bound ships?

A. Yes, sir; they would go in nearer to Long Branch.

129 By Mr. THOMSON:

Q. They wouldn't go anywheres near the light-ship?

A. No, sir.

As bearing upon the 93rd requested findings of fact, the only evidence introduced as aforesaid is stated and set forth in connection with the requested findings Nos. 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81 and the other findings and requested findings of fact.

As bearing upon the finding of fact requested on behalf of the Martello numbered 93, the only evidence introduced as aforesaid is heretofore stated and set forth in connection with the findings of fact numbered 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and the other findings and requested findings of fact in addition to the facts found by the court herein.

As bearing upon the finding of fact requested on behalf of the Martello numbered 94, the only evidence introduced as aforesaid is as follows:

ICHABOD WILLEY, on behalf of the Willey, testified:

By Mr. GOODRICH:

Q. Did the vessel make more speed before you took off some of the sails, at 7 o'clock, than she did before that?

A. I should say that there wouldn't be much difference. As the wind increased a little I took sails off. We appeared to be making about the same right along.

130 As bearing upon the finding of fact requested on behalf of the Martello numbered 95, the only evidence introduced as aforesaid is stated and set forth in connection with the other findings and requested findings of fact herein in addition to the facts found by the court.

As bearing upon the finding of fact requested on behalf of the Martello numbered 96, the only evidence introduced as aforesaid is as follows:

FRANCIS ELDON JENKINS, on behalf of the Martello, testified:

By Mr. GOODRICH:

Q. When the pilot left what course did you have?
A. After the pilot left I steered E. by S.

As bearing upon the findings of fact requested on behalf of the Martello numbered 97, 102, and 103, the evidence introduced as aforesaid is heretofore stated and set forth in connection with and as bearing upon the finding- of fact numbered 18, 19, 42, 94, 96, 101, and the other findings and requested findings of fact.

As bearing upon the finding- of fact numbered 98 and 100 requested on behalf of the Martello, the only evidence introduced as aforesaid is stated and set forth in connection with and as bearing upon the findings of fact numbered 53, 54, 55, 70, and the other findings and requested findings of fact.

131 ICHABOD WILLEY, for the Martello, testified:

By Mr. THOMSON:

Q. How long before the collision did you see the steamer?
A. About two minutes.
Q. Did you see the direction she was sailing in?
A. Yes, sir.
Q. Did it occur to your mind that if you luffed you might have avoided a collision?
A. Yes; and I should if he had given me the proper whistles to let me know what he was going to do.

As bearing upon the finding of fact requested on behalf of the Martello numbered 101, the only evidence introduced as aforesaid is as follows:

ICHABOD WILLEY, for the Martello, testified:

Q. Did you stand on one course right north from the twenty miles south of the light-ship from four o'clock right on?
A. Yes, sir; heading about north, yes.
Q. Stood on tack?
A. One tack all the way.
Q. And you kept heading about north all the time?
A. A little off and a little up as the wind varied.

It is stipulated that the testimony contained in this bill of exceptions and the amendments thereof shall be referrable indifferently to each exception with the same effect as though particularly cited thereunder.

Dated July 11, 1890.

GOODRICH, DEADY & GOODRICH,
Proctors for "Willey."

132 The counsel for the Martello and her owners then requested the court to make the following findings of fact and conclusions of law, viz:

Findings of Fact.

1. The Martello is a British steamship of 2,439 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, owned by the respondents and appellants Charles Henry Wilson and Arthur Wilson, and is one of the Wilson line of steamers plying between New York and Hull and other foreign ports.

2. The Martello left her dock on Jersey City on Saturday afternoon, May 7, 1887, laden with a miscellaneous cargo of merchandise bound for Hull, England. The weather was so foggy that she could not go down the channel, but anchored for the night in Gravesend bay.

3. The Martello raised anchor at 5.30 a. m. Sunday, May 8, 1887, and started for sea in command of Captain Francis Eldon Jenkins, the senior captain in the New York service of the line, and in charge of Pilot Joseph Henderson. The weather was thick, but sufficiently clear to enable the buoys marking the channel to be seen. The Martello proceeded down the swash channel and thence through Gedney's channel to sea, reaching the station-boat and discharging the pilot at about 7.05 a. m.

4. The point where the Martello discharged the pilot is about 500 to 600 feet easterly of the black buoy, the usual point for dis-
133 charging pilots. The steamer did not stop altogether, but slowed down to a speed of about a knot an hour.

5. After discharging the pilot the Martello started "slow ahead" at about 28 revolutions of the propeller, or a speed of about 3 and ½ to 4 knots per hour. Immediately after leaving the pilot the fog grew denser, and at about 7.20 the master sent word to the engineer to go as slow as possible. The engines were thereupon reduced to 24 revolutions, giving a speed of about 3 to 3½ knots per hour. The captain was on the bridge, the third officer was with him, a competent lookout was stationed in the cro'nest, the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel. The whistle of the steamer was bl-wn at intervals of thirty seconds or less.

6. The speed of the Martello was as low as possible consistent with good steerage-way, and at from 22 to 23 the engines would not have turned the wheel over.

7. At about 7.50 the horn of the sailing vessel was heard on the

starboard bow, and almost simultaneously the barkentine Freda A. Willey loomed in sight. The first officer immediately called out "hard-a-port" and the lookout reported a vessel on the starboard bow. The captain immediately ordered the helm hard-a-port, and the engine reversed at full speed.

8. The Freda A. Willey is a barkentine 150 feet in length, 33.4 feet beam, and 17.5 feet in depth. On the voyage in question she had sailed from Pensacola, Florida, bound for New Haven with a
134 cargo of pine lumber. The Willey had sailed that morning, commencing at 4 o'clock from a point about 20 miles to the southward of the Scotland light-ship to the point of collision, which was about two miles to the northward of the Scotland light-ship.

9. Those on board the Willey heard the fog whistle of the Martello at least three times previous to seeing the steamer, and were thereby warned of the steamer's proximity.

10. The barkentine when sighted by the Martello had all her sails set with the exception of the fore-royal and the main and mizzen gaff-topsail and was proceeding at the rate of about 5 knots per hour.

11. As the vessels neared each other the first officer of the Martello called out to the barkentine, "Luff, luff all you can." No attention was paid to this request and no measures whatever taken at any time by those on the barkentine to avert the collision.

12. The speed of the steamer under a hard-a-ported helm and with engines reversed at full speed became gradually reduced, and at the time of the collision was not above one knot an hour.

13. The speed of the Martello in the fog was moderate, her lookout was competent and thorough, and those in charge of her did all in their power to avert the threatened collision.

14. The speed of the Willey in the fog was immoderate and excessive and she was negligently and improperly handled when the collision was impending.

15. The collision was caused by the negligence and im-
135 proper navigation of the barkentine in running at too high a rate of speed in a fog, in paying no attention to the fog whistle of the Martello, and in taking no measures to avoid a collision after the Martello was seen and the danger of collision was imminent and apparent.

Conclusions of Law.

1. The Martello was free from fault.

2. The Freda A. Willey was in fault and the collision was occasioned by her negligence and improper navigation and her neglect of proper preca-tions and her failure to take any measures to avert the threatened collision.

3. The claimants, Charles Henry Wilson and Arthur Wilson, are entitled to a reversal of the decree of the district court against the Martello in favor of the libellants, Ichabod Willey, and in the cross-action are entitled to a decree against the Freda A. Willey for the full amount of their damages, with costs in the district court and in this court.

Thereafter and on the 31st day of July, 1889, the said judge made and filed the following findings of fact and conclusions of law, viz:

Findings of Fact.

1. The Martello is a British steamship of 2,439 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, owned
136 by the respondents and appellants, Charles Henry Wilson and Arthur Wilson, and is one of the Wilson line of steamers plying between New York and Hull and other foreign ports.

2. The Martello left her dock in Jersey City on Saturday afternoon, May 7, 1887, laden with a miscellaneous cargo of merchandise, bound for Hull, England. The weather was so foggy that she could not go down the channel, but anchored for the night in Gravesend bay.

3. The Martello got under way from Gravesend bay about 6 a. m. Sunday, May 8, 1887, and started for sea in command of Captain Francis E. Jenkins, the senior captain of the New York service of the line, and in charge of Pilot Joseph Henderson. The weather was thick, but sufficiently clear to enable the buoys marking the channel to be seen. She proceeded down the swash channel and thence through Gedney's channel to sea.

4. When about half a mile to the westward of the perch-and-ball buoy, *i. e.*, about north from the black buoy No. 1, her engine was stopped for the purpose of slowing the vessel until the pilot could be discharged; that being done, the engines were at 7.10 a. m. moved slow ahead.

5. About 40 minutes after discharging the pilot the horn, one blast of a sailing vessel, was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the cro'nest, about 100 feet abaft the stern, the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel.

137 6. At that time the ~~steamer~~ was heading E. S. E.; the wind was about E. by N., blowing a five to six knot breeze; the fog had grown denser and vessels could not be seen over a quarter of a mile away; the whistle of the steamer had been blown regularly at intervals of thirty seconds or less, and her speed was about 5½ to 6 knots an hour; three knots an hour would give her good steerage-way.

7. About a minute or two after hearing the horn the officers of the Martello saw the barkentine Freda A. Willey looming in sight through the fog.

8. On April 24, 1887, the barkentine Freda A. Willey left Pensacola, bound through Long Island sound for New Haven, with a cargo of yellow-pine lumber, and on Sunday, May 8, about 8 o'clock a. m., she was bound into the harbor of New York.

9. The Willey, with all her sails set, can make ten knots an hour; with the wind, as found in the sixth finding, the Willey, if going at less than four knots an hour, would not have steerage-way sufficient

to give her master thorough control of her to tack, wear, or manage her as occasion might require.

10. About 4 a. m. of May 8 she was sailing with her mainsail, spanker, main-staysail, upper and lower fore-topsails, fore-topgallant sail, and three jibs; at 5 a. m. the wind freshened and she
138 took in her royal; at 7 a. m., the wind freshening, her fore-sail was hauled up.

11. There was on deck of the Willey, before the collision, Cobb, able seaman; on the lookout, Mathlin, able seaman; at the wheel, Ludvinger, second mate, and Willey, captain, about her deck; the rest of the crew were below; she was heading north, close-hauled on the starboard tack, sounding her horn at intervals of one or two minutes, and making about four knots an hour.

12. While thus proceeding she thrice heard the steamer whistle of a steamer, answering promptly each time with a single blast of her horn; at this last signal the Martello appeared in sight, bearing about four points on the port bow and a quarter of a mile away.

13. As soon as the Willey loomed in sight of those on the Martello, as indicated in the seventh finding, the first officer of the steamship called out hard-a-port, and the lookout reported a vessel on the starboard bow; the captain immediately ordered the helm hard-a-port and the engines reversed full speed.

14. The speed of the Martello under a hard-a-port helm and with engines reversed at full speed became gradually reduced, and at the time of the collision was about two knots an hour.

139 15. The place of collision was about $1\frac{3}{4}$ miles about N. by E. from Sandy Hook light-ship.

16. As the vessels neared each other the first officer of the Martello called out to the barkentine, "Luff, luff all you can," but his call was not heard by those on the Willey.

17. From the time of the hearing of the first whistle down to the time of the collision the steamer, except as stated in the 16th finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines. In consequence the Willey held her course as she was bound to do, but the steamer ran into her with great violence, the steamer's stem running into the port bow of the barkentine, cutting its way into her keel, knocking her stem over to starboard and driving her bow round to eastward.

18. Had the steamer been going at three knots an hour, had she stopped her engines as soon as she heard the Willey's horn and reversed when she sighted the barkentine, she would have stopped out of the Willey's course.

19. The master of the barkentine was on deck; he had his vessel under control. If, when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer
140 was starboarding her wheel, he could have ported and avoided the collision. If, at that time, the steamer had ported her wheel the barkentine, keeping her course, would have crossed the steamer's bow in safety. If, at that time, the master of the barken

tine had been advised that the steamer was reversing he could have ported and avoided the collision.

Conclusions of Law.

1. The Freda A. Willey was free from fault.
2. The Martello was in fault for proceeding at an excessive rate of speed in a fog and is solely responsible for the collision.
3. There should be a decree for the Freda A. Willey and against the Martello in each case, with costs of the district and circuit courts.

And at the same time rendered and filed the following opinion:

LACOMBE, *C. Judge:*

This is an appeal from a decree of the district court apportioning the damages resulting from a collision in a fog between the steamer Martello and the barkentine Freda A. Willey on May 8, 1887. The colliding vessels were on crossing courses and came together nearly at right angles, the steamer's stem striking the barkentine between her stem and the cat-head. Both vessels were damaged and cross-libels were filed.

141 The location of the collision is fixed by the district judge at 1¾ miles N. by E. from Sandy Hook light-ship. I am inclined to the opinion that it lies somewhat further to the eastward. The soundings recorded in the Willey's log seem to indicate that her course was, as her captain testifies, about a mile to the eastward of the light-ship. It is not, however, necessary to determine this location with precision, and the conclusion of the learned district judge on that point may be accepted here.

The respective speed of the colliding vessels is the material and controlling fact in the case. Examination of the record has led to the opinion that the conclusion reached by the district judge, first, that the steamer was moving at the rate of 5½ to 6 knots and the barkentine at the rate of 4 knots an hour is correct. It will not be profitable to enter upon a consideration of the evidence in detail in view of this careful and exhaustive discussion of the various items of proof which, notably in the case of the steamer, led him to that conclusion in the face of the direct testimony of her officers. Suffice it to say that the Martello's witnesses substantially agree in giving her a uniform speed from about the time the pilot left down to the time she reversed upon sighting the Willey. That being so, the most persuasive argument as to her rate of speed is found in a comparison of the time which elapsed with the distance traversed between these periods. If the time is taken as given in the Martello's log and the distance as found by the district judge, she

142 must be given a speed of between 5½ to 6 knots an hour, and if the collision occurred further to the eastward her speed would be even greater. At any rate, it is plain that a reversal of her engine's full speed, ordered as soon as the Willey came in sight, (7.50) a. m., failed to overcome the forward impetus resulting from

her prior rate of speed, and this failure was not promoted or assisted by any improper change of the Willey's course. As the Martello would have had good steerage-way at three knots an hour, her speed, therefore, was not moderate under the decisions, and for the resulting damage she must be held to blame.

The district judge has found the Willey in fault (1) for going at too high a rate of speed and (2) for failing to check speed after the steamer's whistle was heard. An effort to check speed by executing the maneuver described in the case cited (Zadok, probate div., 117) would have brought about a change of course, and she was bound to keep her course, under the 22d rule, at least until the existing situation afforded reasonable assurance that a change would prevent a collision otherwise imminent and would not itself tend to produce the very mishap it was intended to avoid; but the existing situation was such that the mate of the Willey could not prudently change her course in time to be of any service. The district judge so held and rightly upon the proof. The sole question as to the Willey, then, is this: Was her speed of four knots an hour immoderate under the existing conditions of fog, wind, and situa-
143 tion? None of the cases cited in the opinion or on the argument have gone to that extent. In those where the sailing vessel was going four knots an hour she was not charged with fault; in the cases where she was held in fault her speed was five knots or over.

The facts in proof do not show that her speed was too great to admit of the execution of such mano-uvres as the situation in which she found herself might require. Her captain was on deck with his vessel under command. Had the steamer advised him by signal under the 19th rule or otherwise that she was directing her course to starboard, he could have kept his course; had she advised him she was directing her course to port or that she was reversing, he could have ported his wheel and avoided a collision. For any such indication of the steamer's mano-uvres the Willey's master was on the watch ready to respond, and at a speed of four knots an hour a prompt response would have prevented an accident.

In the absence of any such indication, however, he would not have been justified in violating the 22d rule by a change of course; nor did the Willey's speed prevent the Martello from avoiding the collision, because had the latter been going at a lower rate of speed, had she stopped her engines when she heard the Willey's horn and reversed, as she did when she sighted the barkentine, she would have stopped short of the Willey's track, whether the barkentine was going fast or slow, except to the extent that in going
144 slower the Willey would, at 7.50 a. m., have been further down the coast than the place of collision. Her rate of speed cannot be said to have contributed to the collision and should not be charged against her as faulty navigation.

The district court held that the Willey had by no means brought her speed down to the standard of good steerage-way; on the contrary, she was going at nearly full speed. In support of this proposition there was no direct testimony below, and the uncontradicted

proof in this court shows that with all her sails set she is a good ten-knot vessel, loaded, or twelve, light, in a nice set of ballast, and that at less than four knots she would not have steerage-way sufficient to give her master perfect control of her, tack, wear, and handle her as occasion might require.

There should be a decree for the Willie and against the Martello in each case.

Thereafter the counsel for the Martello and her owners requested the judge to make the following additional findings of fact and conclusions of law, viz:

Additional Findings on Behalf of the Martello and Owners.

16. Captain Jenkins has held a master's certificate since 1856. Pilot Henderson has been a New York and Sandy Hook pilot for nearly forty-two years.

145 17. Orders had been given for steam at 6 o'clock on the morning of May 8, but at 5.30 a. m. Pilot Henderson, finding that steam was already up, gave orders to raise the anchor at once, and thereupon started for sea.

18. The Martello discharged her pilot at the usual point where pilots are discharged from outgoing steamers.

19. The usual point for discharging pilots from outgoing steamers is about 500 to 600 yards easterly from the black buoy No. 1.

20. The Martello did not entirely stop in the water to discharge the pilot, but only diminished her speed for that purpose.

21. The method of communication between the bridge and the engine-room on the Martello was the Chadbourne dial. On this dial the signals for speed are "stop," "stand by," slow ahead," "half speed ahead," "full speed."

22. The signal "slow ahead" on the dial indicated the rate of speed produced by the engines when working at 28 revolutions per minute.

23. The best speed of the Martello is between twelve and
146 thirteen knots, the engines working between 58 and 59 revolutions per minute.

24. The speed of the Martello with her engines working at 28 revolutions per minute would not be more than five knots per hour.

25. Five knots per hour under the circumstances would not be an immoderate speed for the Martello.

26. The Martello at the instant of sighting the barkentine was proceeding slowly ahead, the engines working at about 24 revolutions per minute.

27. The lowest speed at which the engines could be worked to give the Martello good steerage-way was 24 revolutions per minute.

28. The speed of the Martello with her engines working at 24 revolutions per minute would not be more than four knots per hour.

29. A speed of four knots per hour under the circumstances would be a moderate speed for the Martello.

30. Article XIII of the International Rules and Regulations for preventing collisions at sea is as follows: "Every ship, whether sailing ship or steamship, shall in a fog, mist, or falling snow go at a moderate speed."

147 31. The moderate speed required by this article is not a fixed rate of knots per hour, but something materially less than the vessel's full speed.

32. The Willey at four o'clock on the morning of the collision was some twenty miles to the southward of the Sandy Hook light-ship.

33. The speed of the Willey under the sail she carried and with a five or six knot breeze blowing was more than four knots per hour.

34. The speed of the Willey under the sail she carried and with a five or six knot breeze was not less than five knots an hour.

35. The Willey at the time of the collision was carrying not less than 2,191 square yards of canvas.

36. Any reduction of canvas made on the Willey was not to diminish her speed, but only to avoid increase of speed.

37. The amount of canvas carried by the Willey was more than sufficient for good steerage-way.

38. There is no competent evidence that a speed of four knots per hour was necessary for proper steerage-way.

148 39. The only testimony as to the rate of speed necessary for steerage-way on the barkentine was that of her captain, the libellant Willey.

40. The uncor-oborated evidence of the captain of the barkentine was and is insufficient to establish the rate of speed necessary for the proper steerage-way of the barkentine.

41. A speed of four knots an hour was more than sufficient for proper steerage-way on the barkentine.

42. The point of collision was about two miles northward of the Sandy Hook light-ship.

43. The Willey at the time of and for some time previous to the collision was directly across the line of outgoing European steamers.

44. The ordinary course of outward-bound European steamers after leaving Gedney channel is about E. S. E., and therefore across the course pursued by the barkentine.

45. The position of the barkentine required greater care and caution in her navigation than would be necessary on the open sea, where other vessels were not to be specially looked for.

149 46. A speed of four knots an hour for a sailing vessel approaching New York harbor in a thick fog and directly in the line of outgoing steamers is immoderate speed.

47. The prudent course for the navigation of the Willey under the circumstances would have been — northwesterly one, she not being confined to any channel and wind- free.

48. Article XIX of the international rules and regulations for preventing collisions at sea is as follows: "In taking any course authorized or required by these regulations a steamship under way

may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz., one short blast, to mean I am directing my course to starboard; two short blasts to mean I am directing my course to port; three short blasts to mean I am going full speed astern. The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made."

49. The rule XIX being optional, no fault or consequence attaches to a vessel which does not avail itself of these signals.

50. It is fault in a sailing vessel in danger of colliding with
150 a steamer to wait for the signals under rule XIX and take no measures to avert the threatened danger.

51. It was the duty of the barkentine under the circumstances and with danger imminent to use all the means reasonably within her power to avert the collision.

52. The master of the barkentine was advised of the position and probable course of the Martello and the possible danger to his own vessel from 5 to 10 minutes prior to the collision.

53. If the master of the Willey on seeing the danger had luffed immediately the collision would have been averted.

54. Such a maneuver on the part of the barkentine was excusable.

55. Such a maneuver on the part of the barkentine if unavailing to avert entirely the collision would not have increased the resulting damage.

56. The crew of the barkentine consists of a captain, mate, second mate, five men before the mast, and the steward, nine in all.

151 57. It was the duty of the master of the barkentine, upon the approach of danger, to call all hands on deck in order that any measures necessary for preventing a collision might be promptly carried out.

58. The portion of the crew on deck at the time the Martello hove in sight was insufficient to carry out promptly the measures necessary for preventing a collision.

59. The master of the barkentine took no measures whatever to avert the collision or lessen its force.

60. The master of the barkentine, instead of taking measures to avert the collision, waited for the steamer to give the optional signals under rule XIX.

61. The master of the barkentine, even when the danger was imminent, took no measures to avert it.

62. The inaction of those on board the barkentine contributed to the collision.

63. When the two vessels sighted each other the steamer was helpless for avoiding the collision, but the reverse was the case with the barkentine.

64. The speed of the Martello at the instant of collision under a hard-a-port helm and with her engines reversed at full speed was not greater than one knot per hour.

152 65. There was no reduction of speed nor any measure taken to reduce speed on the part of the barkentine or to check her headway.

66. A speed of one knot per hour on the part of the steamer was sufficient to cause the damage to the barkentine.

67. The damage to the barkentine was not greater than could be caused under the circumstances by a speed on the part of the steamer of one knot per hour.

68. The steamer, with a speed of two knots per hour at the instant of collision, would probably have caused much greater damage to the barkentine.

69. If the barkentine had been sailing at a moderate rate of speed the collision would not have occurred.

70. The master of the barkentine, having due regard to the danger of collision, which was immediate and imminent, was not under an inflexible obligation to hold his course, but was bound to use such measures as, with regard to the special circumstances of the case, were necessary to avoid collision.

153 71. The barkentine contributed to the collision by proceeding in a thick fog across the line of outward-bound European steamers at an immoderate rate of speed; by neglecting to properly blow her horn, and by waiting for the optional signals under rule XIX, instead of taking measures at once to avert the collision.

Thereafter and on or about the 6th day of September, 1889, the said judge filed the said additional requests to find, having found as requested in the findings marked 16, 30, 31, 32, 35, 44, 48, 51, and 56, and failed and refused to find the remaining requested findings of fact.

Thereafter the said Charles Henry Wilson and Arthur Wilson requested the said judge to make the following additional findings of fact and law, viz:

72. After discharging the pilot the steamer proceeded on at about 28 revolutions of the propeller per minute.

73. Shortly after discharging the pilot the fog became denser.

74. At about 7.20 the captain of the Martello directed the third officer orally to go down to the third engineer and tell him to go as slow as he could.

154 75. The third mate went down to the engine-room and delivered the message from the captain to go as slow as possible to the engineer.

76. The engineer received the message through the third officer and thereupon reduced the engine to 24 revolutions per minute.

77. The engines were continued at 24 revolutions per minute until they were reversed at full speed at the time or shortly before the barkentine was sighted.

78. The ordinary full speed of the Martello is produced by the engines working at 58.2 revolutions per minute.

79. The ordinary full speed of the Martello is between 11 and 12 knots.

80. At from 22 to 23 revolutions per minute the Martello's engine would not turn the wheel over.

81. On her trial trip the Martello made 13½ knots per hour.

82. The barkentine loomed in sight of those on the steamer almost simultaneously with hearing the horn.

83. Five knots an hour would be improper, excessive, and immoderate speed for the barkentine in the fog.

155 84. Five and ¼ knots an hour would be improper, immoderate, and excessive speed for the barkentine in a fog.

85. The master of the barkentine was navigating his vessel without consideration of the fact that he was crossing the course of eastward-bound steamers.

86. The barkentine was being navigated without consideration of the fact that Saturday is a "great day" for European vessels going out of New York harbor.

87. The barkentine was being navigated without consideration of the fact that the preceding day (Saturday) had been foggy.

88. The barkentine was being navigated without consideration of the fact that by reason of the fog many European steamers would be unable to sail Saturday.

89. The barkentine was being navigated without consideration of the fact that such steamers that did not get away Saturday would probably anchor in the channels or around Sandy Hook and start out Sunday morning.

90. The barkentine was being navigated without consideration of the fact that she was liable to be right in the way of a number of large steamers where she was heading north and crossing their track.

156 91. The master of the barkentine was a careful navigator was bound to take into consideration the matters stated in numbers 85, 86, 87, 88, 89, and 90, and proceed with caution accordingly.

92. Article XXIV of the international rules and regulations for preventing collisions at sea is as follows:

"Nothing in these rules shall exonerate any ship or the owner or master or crew thereof from the consequence of any neglect to carry lights or signals or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

93. The speed of the Martello in the fog was moderate.

94. From 4 o'clock in the morning until the collision there was little difference in the Willey's speed. She made about the same right along.

95. The collision was caused or contributed to by the negligent and improper navigation of the Willey in taking no measures to avoid collision when danger was apparent.

96. The Martello after discharging her pilot proceeded on her voyage on a course E. by S.

157 97. The collision occurred about two miles northward of the Sandy Hook light-ship.

98. If the Willey had luffed the collision might have been avoided.

99. The rule XIX being optional, no fault or consequence attaches to a vessel on account of not making the signals thereunder.

100. The Willey should have luffed irrespective of whether the whistles under rule XIX were given or not.

101. The Willey stood on one course right north from 4 o'clock a. m. right on.

102. The collision took place north from the Sandy Hook light-ship.

103. The collision took place two miles distant from the Sandy Hook light-ship.

Conclusion of Law.

4. The Willey was in fault.

And thereafter and on the 4th day of October, 1889, the said circuit judge filed the said additional findings so requested, having declined or refused each thereof separately, and having also declined or refused to find the said conclusion of law, and also
158 filed the following finding, viz: "The additional findings of fact requested (on behalf of the Martello and owners) must be refused. As to some of them, the propositions are material, but have already been found the other way; as to the others, the propositions are not material to the determination of the cause, although many of them are sustained by uncontradicted evidence. Most of them, moreover, are in reality not requests to find the facts of the case, but requests to find the evidence.

E. HENRY LACOMBE."

Dated October 4, 1889.

And thereafter the counsel for the Martello and her owners requested the said judge to make the following additional finding of fact and conclusion of law, viz:

The following additional finding of fact and conclusion of law are hereby requested on behalf of the owners of the Martello:

104. The horn of the Willey on board of her and sounded at the time of the collision was not a horn sounded or to be sounded by mechanical means, but was a tin fog-horn.

159 *Conclusions of Law.*

5. The Willey was in fault for not having and using a horn sounded by mechanical means, as required by article 12 of the international rules for preventing collisions at sea.

And thereafter and on or about the 11th day of July, 1890, the said circuit judge filed the said additional requests to find, having found the said finding of fact as requested and having refused to find the said conclusion of law as requested.

And thereupon and before the entry of any judgment or decree in said causes or either of them and the allowance of this bill of exceptions and within the time allowed for that purpose by the

rules and practice of this court, the said Charles Henry Wilson and Arthur Wilson filed in the office of the clerk of this court and served upon Messrs. Goodrich, Deady & Goodrich, proctors for the Willey and her owners, with notice of filing, the following exceptions separately to the findings of fact and conclusions of law made and filed by said judge as being unsustained by any proper legal evidence and being in opposition to the facts as proved by the testimony presented and as contrary to law, and also separately to the failure and refusal of the said judge to make the findings of fact and conclusions of law submitted and proposed to him on behalf of said
160 Charles Henry Wilson and Arthur Wilson, and which said judge was requested to make as supported by competent and relevant testimony.

Exceptions Taken by Charles Henry Wilson and Arthur Wilson, Owners of the British Steamship Martello, Her Engines, etc., on the Determination of the Above-entitled Cross-causes.

The said Charles Henry Wilson and Arthur Wilson, claimants and owners of the British steamer Martello and cross-libellants and appellants in the above-entitled cross-causes, hereby except separately to the findings of fact and conclusions of law of the judge on the trial herein as made and filed by him as follows:

First exception.

They hereby except to so much of the third finding of fact as found by the judge herein as finds that "the Martello got under way from Gravesend bay about 6 a. m. Sunday, May 8th, 1887."

Second exception.

They further except to as much of the fourth finding of fact as found by said judge as find- that the engines were at 7.10 a. m. moved ahead.

Third exception.

They further except to so much of the fifth finding of fact as found by said judge as finds that about 40 minutes after discharging the pilot the horn of a sailing vessel was heard.

Fourth exception.

161 They further except to so much of the sixth finding of fact as finds that vessels could not be seen more than a quarter of a mile away.

Fifth exception.

They further except to so much of the sixth finding of fact as finds that the speed of the Martello was about 5½ to 6 knots an hour.

Sixth exception.

They further except to so much of the sixth finding of fact as finds that three knots an hour would give the Martello good steerage-way.

Seventh exception.

They further except to so much of the seventh finding of fact as finds that the Freda A. Willey loomed in sight a minute or two after the hearing of the horn.

Eighth exception.

They further except to so much of the eighth finding of fact as finds that the barkentine Freda A. Willey was bound into the harbor of New York.

Ninth exception.

They further except to the ninth finding of fact and to each and every part thereof.

Tenth exception.

They further except to so much of the tenth finding of fact as finds that at 7 a. m., the wind freshening, her foresail (the barkentine) was hauled up.

Eleventh exception.

They further except to so much of the eleventh finding of fact as finds that the barkentine was sounding her horn at intervals of one or two minutes.

162 Eleventh exception (A).

They further except to so much of the eleventh finding of fact as finds that the Willey was sailing close-hauled.

Twelfth exception.

They further except to so much of the said seventh finding of fact as finds that the barkentine was making about four knots an hour.

Thirteenth exception.

They further except to so much of the twelfth finding of fact as finds that the barkentine answered the steamer's whistle "promptly each time with a single blast of her horn."

Thirteenth exception (A).

They further except to so much of the twelfth finding of fact as finds that "the Martello appeared in sight a quarter of a mile away."

Fourteenth exception.

They further except to so much of the fourteenth finding of fact as finds that "the speed of the Martello at the time of the collision was about two knots an hour."

Fifteenth exception.

They further except to the fifteenth finding of fact and to each and every part thereof.

Sixteenth exception.

They further except to so much of the sixteenth finding of fact as finds that the call of the first officer of the Martello to the
163 barkentine to luff was not heard by those on the barkentine.

Seventeenth exception.

They further except to so much of the seventeenth finding of fact as finds that "from the time of the hearing of the first whistle down to the time of the collision the steamer, except as stated in the sixteenth finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines," and that in consequence the Willey held her course, as she was bound to do, but the steamer ran into her with great violence.

Eighteenth exception.

They further except to the eighteenth finding of fact and to each and every part thereof.

Nineteenth exception.

They further except to so much of the nineteenth finding of fact as finds that the master of the barkentine had his vessel under control.

Twentieth exception.

They further except to so much of the nineteenth finding of fact as finds that "if when the steamer first sighted the barkentine the master of the latter had been advised that the steamer was
164 starboarding her wheel he could have ported and avoided the collision.

Twenty-first exception.

They further except to so much of the nineteenth finding of fact as finds that if when the steamer first sighted the barkentine the master of the barkentine had been advised that the steamer was reversing he could have ported and avoided the collision.

Twenty-second exception.

They further except to the first conclusion of law as found by the judge herein and to each and every part thereof.

Twenty-third exception.

They further except to the second conclusion of law as found by the judge herein and to each and every part thereof.

Twenty-fourth exception.

They further except to the third conclusion of law as found by the judge herein and to each and every part thereof.

The said Charles Henry Wilson and Arthur Wilson also except separately to the failure and refusal of the said judge to make the findings of fact and conclusions of law requested by them, as follows:

165 Twenty-fifth exception.

They except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that "the Martello raised anchor at 5.30 a. m. Sunday, May 8, 1887, and started for sea."

Twenty-fifth exception (A).

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the Martello reached the station-boat and discharged her pilot at about 7.50 a. m.

Twenty-sixth exception.

They further except to the ruling and decision of the judge on the trial for that he failed and refused to find, as requested, that "the point where the Martello discharged the pilot is about 500 to 600 feet easterly of the black buoy."

Twenty-seventh exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the point where the Martello discharged the pilot is the usual point for discharging pilots.

166 Twenty-eighth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the steamer did not stop altogether to discharge the pilot, but slowed down to a speed of about a knot an hour.

Twenty-ninth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that after discharging the pilot the Martello started ahead at about 28 revolutions of the propeller.

Thirtieth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that after discharging the pilot the Martello started ahead at a speed of about 3 and ½ to 4 knots per hour.

Thirty-first exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that at 7.20 the master of the Martello sent word to the engineer to go as slow as possible.

Thirty-second exception.

167 They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the engines of the Martello were, about 7.20 a. m., reduced to 24 revolutions.

Thirty-third exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the speed of the Martello was, about 7.20, reduced to about 3 to 3½ knots per hour.

Thirty-fourth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the speed of the Martello was as low as possible consistent with good steerage-way.

Thirty-fifth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that at from 22 to 23 revolutions the engine would not have turned the wheel over.

Thirty-sixth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that at about 7.50 a. m. the horn of a sailing vessel was heard
168 on the starboard bow.

Thirty-seventh exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that almost simultaneously with the hearing of the horn the barkentine Freda A. Willey loomed in sight.

Thirty-eighth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the place of collision was about two miles to the northward of the Scotland light-ship.

Thirty-ninth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find the ninth finding of fact on behalf of the Martello, as requested.

Fortieth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the barkentine when sighted by the Martello had all her sails set excepting the fore-royal and the main and mizzen-gaff-top sails.

169 Forty-first exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the barkentine when sighted by the Martello was proceeding at the rate of about five knots an hour.

Forty-second exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that no attention was paid by those on the barkentine to the request of the first mate of the Martello to "luff, luff all you can."

Forty-third exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that no measures whatever were taken at any time by those on the barkentine to avert the collision.

Forty-fourth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the speed of the Martello at the time of the collision was not above a knot an hour.

170 Forty-fifth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the speed of the Martello in the fog was moderate.

Forty-fifth exception (A).

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the lookout of the Martello was competent and thorough.

Forty-sixth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused —, as requested, that

those in charge of the Martello did all in their power to avert the threatened collision.

Forty-seventh exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the speed of the Willey in the fog was immoderate and excessive.

Forty-eighth exception.

171 They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the barkentine was negligently and improperly handled when the collision was impending.

Forty-ninth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the collision was caused by the negligent and improper navigation of the barkentine in running at too high a rate of speed in a fog.

Fiftieth exception.

They further except to the ruling and decision of the judge of the trial herein for that he failed and refused to find, as requested, that the collision was caused by the negligent and improper navigation of the barkentine in paying no attention to the fog-whistle of the Martello.

Fifty-first exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find, as requested, that the collision was caused by the negligent and improper navigation of the barkentine in taking no measures to avoid a collision after the Martello was seen and the danger of collision was imminent and apparent.

172 Fifty-second exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find the first conclusion of law on behalf of the Martello, as requested.

Fifty-third exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find as a conclusion of law, as requested, that the Freda A. Willey was at fault.

Fifty-fourth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find as a conclusion of law, as requested, that the collision was occasioned by the negligent and improper navigation of the barkentine.

Fifty-fifth exception.

They further except to the ruling and decision of the judge on trial herein for that he failed and refused to find, as a conclusion of law, as requested, that the collision was caused by the barkentine's neglect of proper precautions.

173 Fifty-sixth exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find as a conclusion of law, as requested, that the collision was occasioned by the failure of the barkentine to take any measures whatever to avert it.

Fifty-seventh exception.

They further except to the ruling and decision of the judge on the trial herein for that he failed and refused to find the third conclusion of law on behalf of the Martello as requested.

The said Charles Henry Wilson and Arthur Wilson also except separately to the failure and refusal of the said judge to find the additional findings of fact and law as requested by them, as follows:

Fifty-eighth exception.

They except to the failure and refusal of the judge to find the additional finding of fact numbered 17 as requested.

Fifty-ninth exception.

They further except to the failure and refusal of the said judge to find the additional find- of fact numbered 18 as requested.

174 Sixtieth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 19 as requested.

Sixty-first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 20 as requested.

Sixty-second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 21 as requested.

Sixty-third exception.

They further except to the failure and refusal of said judge to find the additional finding of fact numbered 22 as requested.

Sixty-fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 23 as requested.

Sixty-fourth exception (A).

They further except to the failure and refusal of the said
175 judge to find the additional finding of fact numbered 24 as requested.

Sixty-fourth exception (B).

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 25 as requested.

Sixty-fifth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 26 as requested.

Sixty-sixth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 27 as requested.

Sixty-seventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 28 as requested.

Sixty-eighth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 29 as requested.

176 Sixty-ninth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 33 as requested.

Seventieth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 34 as requested.

Seventy-first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 36 as requested.

Seventy-second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 37 as requested.

Seventy-third exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 38 as requested.

Seventy-fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 39 as requested.

177 Seventy-fifth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 40 as requested.

Seventy-sixth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 41 as requested.

Seventy-seventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 42 as requested.

Seventy-eighth exception.

They further except to the failure and refusal of the said judge find the additional finding of fact numbered 43 as requested.

Seventy-ninth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 45 as requested.

Eightieth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 46 as requested.

178 Eighty-first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 47 as requested.

Eighty-second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 49 as requested.

Eighty-third exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 50 as requested.

Eighty-fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 52 as requested.

Eighty-fifth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 53 as requested.

Eighty-sixth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact number 54 as requested.

179 Eighty-seventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact number 55 as requested.

Eighty-eighth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 57 as requested.

Eighty-ninth exception.

They further except to the failure and refusal of the said judge to find the additional finding if fact numbered 58 as requested.

Ninetieth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 59 as requested.

Ninety-first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 60 as requested.

Ninety-second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 61 as requested.

180 Ninety-third exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 62 as requested.

Ninety-fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 63 as requested.

Ninety-fifth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 64 as requested.

Ninety-sixth exception,

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 65 as requested.

Ninety-seventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 66 as requested.

Ninety-eighth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 67 as requested.

181 Ninety-ninth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 68 as requested.

One hundredth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 69 as requested.

One hundred and first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 70 as requested.

One hundred and second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 71 as requested.

One hundred and third exception.

They further except to the failure and refusal of the said judge to find the additienal finding of fact numbered 72 as requested.

One hundred and fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 73 a- requested.

One hundred and fifth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 74 as requested.

182 One hundred and sixth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 75 as requested.

One hundred and seventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 76 as requested.

One hundred and eighth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 77 as requested.

One hundred and ninth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 78 as requested.

One hundred and tenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 79 as requested.

One hundred and eleventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 80 as requested.

183 One hundred and twelfth exception.

They further except to the failure and refusal of the said judge to find the additional findings of fact numbered 81 as requested.

One hundred and thirteenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 82 as requested.

One hundred and fourteenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 83 as requested.

One hundred and fifteenth exception.

They further except to the failure and refusal of the said judge to find the additional findings of fact numbered 84 as requested.

One hundred and sixteenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 85 as requested.

One hundred and seventeenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 86 as requested.

184 One hundred and eighteenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 87 as requested.

One hundred and nineteenth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 88 as requested.

One hundred and twentieth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 89 as requested.

One hundred — twenty-first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 90 as requested.

One hundred and twenty-second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 91 as requested.

One hundred and twenty-third exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 92 as requested.

185 One hundred and twenty-fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 93 as requested.

One hundred and twenty-fifth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 94 as requested.

One hundred and twenty-sixth exception.

The further except to the failure and refusal of the said judge to find the additional finding of fact numbered 95 as requested.

One hundred and t-enty-seventh exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 96 as requested.

One hundred and twenty-eighth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 97 as requested.

One hundred and twenty-ninth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 98 as requested.

186 One hundred and thirtieth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 99 as requested.

One hundred and thirty-first exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 100 as requested.

One hundred and thirty-second exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 101 as requested.

One hundred and thirty-third exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 102 as requested.

One hundred and thirty-fourth exception.

They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 103 as requested.

One hundred and thirty-fifth exception.

They further except to the failure and refusal of the said judge to find the additional conclusion of law numbered 104 as requested.

187 One hundred and thirty-sixth exception.

They further except to the failure and refusal of the said judge to find the additional findings of fact numbered from 72 to 103, both inclusive.

One hundred and thirty-seventh exception.

They further except separately to the finding endorsed by said judge upon said additional requested findings of fact numbered 72 to 103.

One hundred and thirty-eighth exception.

They further except to the finding of said judge in relation to said additional findings of fact that as to others the propositions are not material to the determination of the cause.

One hundred and thirty-ninth exception.

They further except to the finding of said judge with reference to said additional requested findings that "most of them are in reality not requests to find the facts of the case."

One hundred and fortieth exception.

They further except to the finding of said judge with reference to said additional requested findings that "they are requests to find the evidence."

188 One hundred and forty-first exception.

They further except to the failure and refusal of said judge for alleged immateriality to find said additional findings of fact numbered 72 to 103, as requested.

One hundred and forty-second exception.

They further except to the failure and refusal of the said judge to find the additional conclusion of law numbered 5, that "the Willey was in fault for not having and using a horn sounded by mechanical means, as required by article 12 of the international rules for preventing collisions at sea," as requested.

And inasmuch as the said several matters do not appear upon the record of said circuit court, the proctors for the owners of the Martello have prepared and caused this bill of exceptions, upon due notice to the proctors for the respondents, owners of the Freda A. Willey, to be settled as the record thereof, according to the form and practice followed by this court and the statute in such case made and provided, and have caused the same to be signed and filed.

Dated July 11, 1890.

E. HENRY LACOMBE.

189 It is hereby consented that the foregoing bill of exceptions may be filed as settled by the Hon. E. Henry Lacombe.

Dated August 20, 1890.

GOODRICH, DEADY & GOODRICH,
Proctors for Willey.

FOSTER & THOMSON,
Proctors for Martello.

(Endorsed:) United States circuit court, southern district of New York. Ichabod Willey *v.* The Steamship Martello, etc. Charles Henry Wilson *et al. v.* The Barkentine Freda A. Willey, etc. Bill of exceptions. Foster & Thomson, proctors for Martello, 52 Wall St., N. Y. city. U. S. circuit court. Filed July 16, 1892. John A. Shields, clerk.

190 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York on the — day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Hon. Addison Brown, district judge.

ICHABOD WILLEY, Libellant,
vs.
THE STEAMSHIP "MARTELLO," &c., Claimants.

This case having been heard on the pleadings and proofs adduced by the respective parties, and argued and submitted by the advocates for the respective parties, and due deliberation being had in the premises;

It is now ordered, adjudged and decreed by the court that the libellant herein recover of the claimants herein one-half his damages sustained herein by reason of the facts alleged in his libel herein, and one-half his costs to be taxed.

And it is further ordered, adjudged and decreed that it be referred to Samuel A. Blatchford, Esq., a commissioner of this court, to ascertain and compute the amount of the damages of the libellant herein, and that he report the same to the court with all convenient speed.

ADDISON BROWN.

191 At a stated term of the district court of the United States for the southern district of New York, held at the U. S. court-rooms in the post-office building in the city of New York on the 19th day of April, 1888.

Present: The Hon. Addison Brown, district judge.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants,
vs.
THE BARKENTINE FREDA A. WILLEY, &c.

This cause having been heard on the pleadings and proofs, and having been argued by the advocates for the respective parties, and due deliberation having been had in the premises;

It is ordered, adjudged and decreed that the libellants herein recover from the barkentine Freda A. Willey, her tackle, apparel and furniture one-half the damages by them sustained by reason of the collision in the libel herein alleged, together with one-half their costs herein to be hereafter taxed; and that it be referred to Samuel A. Blatchford, Esq., a commissioner of this court, to ascertain and compute the amount of such damages, and report thereon to this court with all convenient speed.

ADDISON BROWN.

192 At a stated term of the United States district court for the southern district of New York, held at the court-rooms thereof at New York city, on the 19th day of December, 1888.

Present: Hon. Addison Brown, judge.

ICHABOD WILLEY, Libellant,
against
THE STEAMSHIP "MARTELLO," &c., Whereof CHARLES HENRY WILSON and ARTHUR WILSON are Claimants.

This cause having been heard on the pleadings and proofs of the respective parties and argued and submitted by the advocates thereof, and an interlocutory decree having been duly entered herein awarding the libellant herein one-half his damages and costs, and referring it to Samuel A. Blatchford, Esq., commissioner, to ascertain the damages sustained by the libellant herein and the report of said commissioner having been duly filed on October 25th, 1888, wherein he finds the damages of the libellant to be the sum of $20,304.34, and the interest on said report from October 15th, the date thereof, being $216.67, and the costs having been duly taxed at $822.95, now on motion of Goodrich, Deady & Goodrich, proctors for the libellant, it is

Ordered, adjudged and decreed that the report of the commissioner filed herein as aforesaid be and the same is in all things confirmed, and it is further

Ordered, adjudged and decreed that the libellant Ichabod Willey recover of the steamship "Martello," &c., and Charles Henry
193 Wilson and Arthur Wilson, claimants, one-half the amount of the commissioner's report as aforesaid and interest to date, amounting to $10,260.50 and one-half of the amount of costs, taxed, making $10,671.98.

And it is further ordered, that unless an appeal be taken from this decree within the time allowed by law and the rules and practice of this court, or the same be sooner satisfied, that John Miner and Joseph Henderson, the stipulators on the claimants' stipulations for value and for costs herein, cause the obligations of their stipulations to be performed or show cause before a stated term of this court why execution should not issue against them and their property for the amount of this decree.

ADDISON BROWN.

At a stated term of district court of the United States for the southern district of New York, held at the U. S. court-rooms in the post-office building in the city of New York, on the eighteenth day of December, 1888.

Present: The Hon. Addison Brown, district judge.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants,
against
THE BARKENTINE FREDA A. WILLEY, HER TACKLE, ETC.

194 This cause having been heard upon the pleadings and proofs of the respective parties, and having been argued by the respective advocates—

On motion of Foster & Thomson, proctors for the libellants,

It is ordered, adjudged and decreed, that Charles Henry Wilson and Arthur Wilson, the libellants, recover from the barkentine Freda A. Willey, her tackle, apparel and furniture, one-half the damages by them sustained by reason of the collision in the libel alleged, together with one-half their costs herein.

And the report of the commissioner to whom, by the interlocutory decree herein, it was referred to ascertain the amount of the damages sustained by the said libellants by reason of the said collision having been filed herein on the seventh day of November, eighteen hundred and eighty-eight, and exceptions thereto having been filed by the claimants of the said barkentine, and said exceptions having been duly argued and overruled, and the report of the said commissioner having been in all things confirmed; and it thereupon appearing that the said libellants have sustained damages by reason of the said collision to the amount of six thousand one hundred and fifty-six dollars and seventy cents, as reported by said commissioner; and the costs of the said libellants having been taxed at the sum of six hundred and fifteen dollars and sixty cents.

It is further ordered, adjudged and decreed that the said libellants Charles Henry Wilson and Arthur Wilson do recover herein against the said barkentine Freda A. Willey, her tackle, apparel and furniture, the sum of three thousand and seventy-eight dollars and thirty-five cents, being one-half the damages sustained by them as aforesaid, together with the further sum of thirty-two dollars and thirty-two cents as interest on the said last-mentioned sum from the fifteenth day of October, eighteen hundred and eighty-eight,

195 the date of the said commissioner's report, and also the further sum of three hundred and seven dollars and eighty cents, one-half the costs of the said libellants as taxed, making in all the sum of three thousand four hundred and eighteen dollars and forty-seven cents (3,418.47), and that the said barkentine Freda A. Willey her tackle, apparel and furniture be condemned therefor.

And it is further ordered, that unless an appeal be taken from this decree within the time provided by law and the rules and practice of this court, the stipulators for costs and value on the part of the claimants of the said barkentine Freda A. Willey, viz: Charles A. Jones and Howard N. Baker, cause the engagements of

their stipulations to be performed, or show cause why execution should not issue against them, their goods, chattels, credits and lands to enforce satisfaction of this decree.

ADDISON BROWN.

196 United States District Court, Southern District of New York.

ICHABOD WILLEY
against
THE STEAMSHIP "MARTELLO."

GENTLEMEN: Please take notice that the libellant hereby appeals to the next circuit court of the United States for the southern district of New York from the final decree entered herein December 19th, 1888, and from each and every part of the same.

Dated, New York, December 29th, 1888.

GOODRICH, DEADY & GOODRICH,
Proctors for Appellants, 59 Wall Street, New York.

To Foster & Thomson, proctors for claimants, and Samuel H. Lyman, Esq., clerk, &c.

197 United States District Court, Southern District of New York.

CHARLES HENRY WILSON and Others
against
THE BARKENTINE "FREDA A. WILLEY."

GENTLEMEN: Please take notice that the claimants hereby appeal to the next circuit court of the United States for the southern district of New York from the final decree entered herein December 19th, 1888, and from each and every part of the same.

Dated, New York, December 29th, 1888.

GOODRICH, DEADY & GOODRICH,
Proctors for Claimants, 59 Wall Street, New York.

To Foster & Thomson, proctors for libellants, and Samuel H. Lyman, Esq., clerk, &c.

198 District Court of the United States for the Southern District of New York.

ICHABOD WILLEY, Libellant,
vs.
THE BRITISH STEAMSHIP MARTELLO, ETC.; CHARLES HENRY WILSON and ARTHUR WILSON, Claimants.

SIRS: Please take notice that the above-named claimants, Charles Henry Wilson and Arthur Wilson, hereby appeal to the next circuit court of the United States to be held within and for the southern district of New York from the final decree of this court, entered in the above-entitled cause on the nineteenth day of December, 1888,

whereby it was adjudged and decreed that the libellant above named recover of these claimants the sum of $10,671.98, and that the said steamship be condemned therefor, and these claimants appeal from each and every part of the said decree.

Dated December 29, 1888.

Yours, &c., FOSTER & THOMSON,
Proctors for Claimants.

To Messrs. Goodrich, Deady & Goodrich, proctors for libellants; Samuel H. Lyman, Esq., clerk of the district court of the United States for the southern district of New York.

199 District Court of the United States for the Southern District of New York.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants,
vs.
THE BARKENTINE FREDA A. WILLEY, WILLIAM H. PARSONS *et al.*, Claimants.

SIRS: Please take notice that the above-named libellants, Charles Henry Wilson and Arthur Wilson, hereby appeal to the next circuit court of the United States to be held within and for the southern district of New York in the second circuit from the final decree of this court, entered in the above-entitled cause on the nineteenth day of December, 1888, whereby it was adjudged and decreed that these libellants recover of the said barkentine Freda A. Willey the sum of $348.70, and that said barkentine be condemned therefor, and these libellants appeal from each and every part of said decree.

Dated December 28th, 1888.

Yours, &c., FOSTER & THOMSON,
Proctors for Libellants.

To Messrs. Goodrich, Deady & Goodrich, proctors for claimants; Samuel H. Lyman, Esq., clerk of the district court of the U. S. for the southern district of N. Y.

200 United States District Court, Southern District of New York.

ICHABOD WILLEY, Libellant and Appellant,
against
THE STEAMSHIP "MARTELLO," &c., Whereof CHARLES HENRY WILSON and ARTHUR WILSON are Claimants and Respondents.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

The appeal of the libellant and appellant respectfully shows to this honorable court:

That on or about the 13th day of May, 1887, the libellant exhibited his libel in the district court of the United States for the southern district of New York, against the steamship "Martello," her engines, &c., claiming damages in the sum of $15,000, and pray-

ing among other things that process in due form of law might issue against the said steamship, her engines, &c., and that the honorable court would pronounce for the damages aforesaid of the libellant, and that the said steamship might be condemned to pay the same with costs.

That process was duly waived and the value of said steamship for the purpose of bonding was duly fixed at the sum of twenty thousand dollars, and thereafter, and on or about the 14th day of May, Charles Henry Wilson and Arthur Wilson duly appeared by their proctors and filed a claim to said steamship claiming her for themselves as owners, and on the said day filed a stipulation for
201 value under the rules and practice of the court for twenty thousand dollars. That on or about August 4th, a stipulation was entered into, by and between the proctors for the respective parties that the libel in the action pending in this court between Charles Henry Wilson and another against the barkentine "Freda A. Willey" should stand, as the answer to the libel in this action, as by reference to said stipulation and said libel will more fully appear.

That this cause came on to be heard before Honorable Addison Brown, judge of this court, on the 22d day of November, 1887, and was finally submitted to said judge, on the 10th day of December, 1887, on the pleadings and proofs, and the said judge having deliberated thereon, did on the 24th day of February, 1888, file a decision that the libellant recover one-half his damages and costs, that on or about the 28th day of February, 1888, a decretal order was entered referring it to Samuel A. Blatchford, Esq., a commissioner of this court to ascertain and compute the damages of the libellant by reason of the matters and things alleged in the libel herein. That thereafter and on the 15th day of October, 1888, the said commissioner duly made his report herein, which was filed herein on the 25th day of October, 1888, wherein he finds the damages of the libellant to be $20,304.34, that thereafter the costs of the libellant were duly taxed at $822.95, and on the 19th day of December, 1888, said judge made a final decree in favor of the libellant for one-half his damages and costs, amounting to $10,671.98.

That the libellant and appellant herein is advised and claims that said decree is erroneous, inasmuch as the said libellant was entitled to a decree against the said steamship and her claimants for the full amount of his damages sustained, and that the said steamship be condemned to pay the same.

That this libellant and appellant for this, and other reasons
202 appeals from the whole of said final decree to the next circuit court of the United States for the southern district of New York, and on said appeal he intends to have said cause heard anew in said circuit court, on the pleadings and proofs in the district court and other pleadings and proofs to be introduced in the said circuit court, and this appellant prays that the record and proceedings of the district court may be returned to the said circuit court, and the said decree and every part thereof, may be reversed with costs in the district court, and in this court, or such

other decree thereupon made as to this court shall seem meet, and that the said appellees be condemned to pay to this appellant his costs and damages in the premises.

Dated, New York, January 7th, 1889.

GOODRICH, DEADY & GOODRICH,
Libellant's Proctors, 59 Wall Street, New York, N. Y.

203 United States District Court, Southern District of New York.

CHARLES HENRY WILSON and Another, Libellants,
against
THE BARKENTINE "FREDA A. WILLEY," &c., Claimants.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

The appeal of the claimants and appellants respectfully show- to this honorable court:

That on or about the 25th day of May, 1887, the libellants exhibited their libel in the district court of the United States for the southern district of New York against the barkentine "Freda A. Willey," her tackle, etc., claiming damages in the sum of $3,500, and praying among other things that process in due form of law might issue against the said barkentine, her tackle, etc., and that the honorable court would pronounce for the damages aforesaid of the libellants, and that the said barkentine might be condemned to pay the same with costs.

That process was duly waived, and the value of said barkentine for the purpose of bonding was duly fixed at the sum of five thousand dollars, and thereafter and on or about the 10th day of June, William H. Parsons and others duly appeared by their proctors and filed a claim to said barkentine, claiming her for themselves
204 as owners, and on the 24th day of June filed a stipulation for value under the rules and practice of the court for five thousand dollars, that on or about August 4th a stipulation was entered into by and between the proctors for the respective parties that the libel in the action pending in this court between Ichabod Willey against the steamship "Martello" should stand as the answer to the libel in this action as by reference to said stipulation, and said libel will more fully appear.

That this cause came on to be heard before Honorable Addison Brown, judge of this court on the 22d day of November, 1887, and was finally submitted to said judge on the 12th day of December, 1887, on the pleadings and proofs, and the said judge having deliberated thereon, did on the 24th day of February, 1888, file a decision that the libellants recover one-half their damages and costs; that on or about the 28th day of February, 1888, a decretal order was entered referring it to Samuel A. Blatchford, Esq., a commissioner of this court, to ascertain and compute the damages of the libellants by reason of the matters and things alleged in the libel herein. That thereafter and on the 15th day of October, 1888, the said com-

missioner duly made his report herein, which was filed herein on the 7th day of November, 1888, wherein he finds the damages of the libellants to be $6,156.70; that thereafter the costs of the libellants were duly taxed at $615.60, and on the 19th day of December, 1888, said judge made a final decree in favor of the libellants for one-half their damages and costs, amounting to $3,418.70.

That these claimants and appellants herein are advised and claim that said decree is erroneous inasmuch as the said libellant was entitled to a decree against the said libellants, dismissing the libel with costs.

205 That these claimants and appellants for this and other reasons appeal from the whole of said final decree to the next circuit court of the United States for the southern district of New York, and on said appeal they intend to have said cause heard anew in said circuit court, on the pleadings and proofs in the district court, and other pleadings and proofs to be introduced in the said circuit court, and these appellants pray that the record and proceedings of the district court may be returned to the said circuit court, and the said decree and every part thereof, may be reversed with costs in the district court, and in this court, or such other decree thereupon made as to this court shall seem meet, and that the said appellees be condemned to pay to these appellants their costs and damages in the premises.

Dated New York, January 7th, 1889.

GOODRICH, DEADY & GOODRICH,
Proctors for Claimant, 59 Wall Street, New York, N. Y.

206 In the Circuit Court of the United States for the Southern District of New York.

ICHABOD WILLEY, Libellant,
vs.
THE BRITISH STEAMSHIP MARTELLO, HER ENGINES, ETC.; CHARLES HENRY WILSON and ARTHUR WILSON, Claimants.

To the circuit court of the United States for the southern district of New York:

The petition of appeal of Charles Henry Wilson and Arthur Wilson, the above-named claimants, respectfully showeth, as follows:

On or about the twelfth day of May, eighteen hundred and eighty-seven, Ichabod Willey, the libellant above named, as master of the barkentine, Freda A. Willey, and owner of the cargo laden on board of the said barkentine, filed a libel in the district court of the United States, for the southern district of New York, against the said British steamship Martello, her engines, &c., in and by which said libel it is alleged that the said barkentine, Freda A. Willey, and the cargo laden thereon, were injured by a collision with the said steamship Martello in the amount of fifteen thousand dollars and upwards; that said collision was occasioned solely by the negligence and unskillfulness of those navigating the said steamship Martello,

and praying the condemnation of said steamship to pay the
207 amount of said damages and costs. To the said libel these appellants pray leave to refer for its contents.

Thereafter, and on the fourteenth day of May, 1887, these claimants, Charles Henry Wilson and Arthur Wilson, filed their claim in said district court, claiming the said steamship Montello as owners thereof, and executed a stipulation for costs in said action, and also a stipulation for value in the sum of twenty thousand dollars, the value of said steamship, as fixed for the purpose of bonding.

On or about the third day of August, 1887, the proctors for these appellants entered into a stipulation with the proctors for the libellants that the libel in a certain cross-action instituted by these appellants against the said barkentine Freda A. Willey, should stand as the answer of these appellants to the libel filed by said Willey. To said stipulation and said cross-libel these appellants pray reference.

Thereafter, and on or about the twenty-second day of November, 1887, this cause came on to be heard and tried before the Hon. Addison Brown, judge of the said district court, upon the allegations and proofs adduced by the respective parties upon the issue raised, and the said judge, having advised upon the said allegations and proofs on or about the twenty-eighth day of February, 1887, made an interlocutory decree herein that the said libellant, Ichabod Willey, recover against the said steamship Martello one-half his damages sustained by reason of the said collision, and referring it to the commissioner of this court to ascertain the amount of said damages, as will more fully appear by reference to said interlocutory decree, to which for its contents these appellants pray leave to refer.

Thereafter, and on or about the twenty-second day of March, 1888, and afterwards, from time to time, as such hearing was adjourned, said reference to ascertain the damages of said libel-
208 lant came on and was heard before Samuel A. Blatchford, Esq., the commissioner appointed by said interlocutory decree for that purpose, who, on or about the fifteenth day of October, 1888, made his report herein, which was filed on or about the twenty-fifth day of October, 1888, and in and by which report he finds the damages suffered by the said libellant by reason of the said collision to be the sum of $20,304.34, including interest to the date of said report, as will more fully appear by reference to said report.

Thereafter, and on or about the nineteenth day of December, 1888, a final decree was made by the judge of the said district court, bearing date on that day, in and by which it was adjudged that the said libellant recover of the said steamer Martello one-half the said damages and one-half of his costs, amounting together to the sum of $10,671.98, and that said steamer be condemned therefor, as will more fully appear by said decree, to which these appellants pray reference.

And these appellants are advised and insist that the said decree made in the said cause against the said steamship Martello is erro-

neous and ought to be reversed, inasmuch as the said libel of the said Ichabod Willey should have been dismissed with costs, and the said barkentine held solely liable for the said collision.

And these appellants, for these and other reasons, appeal from the whole of said final decree, and from each and every part thereof to the next circuit court to be held within and for the southern district of New York in the second circuit, and on the said appeal these appellants intend to seek a new decision on the facts on the proceedings and proofs in the said district court, and on other proofs to be adduced in the said circuit court, and for additional and further relief.

And these appellants pray that the said final decree, and each and every part thereof, may be reversed, with costs, and that such
209 other decree may be made thereupon, as the said circuit court shall deem just, and the said appellees condemned to pay to these appellants their costs and damages in the premises.

And these appellants will ever pray, &c.

Dated New York, January 10, 1889.

FOSTER & THOMSON,
Proctors for Appellants, 52 Wall Street, New York.

In the Circuit Court of the United States for the Southern District of New York.

CHARLES HENRY WILSON and ARTHUR WILSON
vs.
THE BARKENTINE "FREDA A. WILLEY," ETC.

To the circuit court of the United States for the southern district of New York:

The petition of appeal of Charles Henry Wilson and Arthur Wilson, the libellants above named, respectfully showeth as follows:

On or about the twenty-fifth day of May, 1887, the libellants above named filed in the district court of the United States for the southern district of New York, their libel against the said barken-
tine Freda A. Willey, her tackle, etc., in said libel mentioned,
210 in a cause of collision, civil and maritime, in which said libel it is alleged that the steamship Martello, owned by these appellants, was injured by a collision with the said barkentine, to an amount of upwards of three thousand five hundred dollars; that said collision and the resulting injury were caused solely by the negligence and unskillfulness of those navigating the said barkentine, and praying the condemnation and sale of the said barkentine to satisfy the said damages, with interest and costs. To said libel, for its contents, these appellants pray leave to refer.

Thereafter, and on or about the tenth day of June, 1887, William H. Parsons, on behalf of himself and others, filed a claim to said barkentine as owners thereof, and on or about the twenty-fourth day of June, 1887, filed the necessary stipulation for costs in said suit, and a stipulation for value, in the sum of five thousand dollars, the value of said barkentine, as fixed for the purpose of bailing.

Thereafter, and on or about the third day of August, 1887, a stipulation was made between the proctors for the respective parties, that the libel in the action pending in said court, instituted by Ichabod Willey, as libellant, against the said steamship Martello, should stand as the answer of these appellants to the libel filed by said Willey. To said stipulation and libel these appellants pray reference.

Thereafter, and on or about the twenty-second day of November, 1887, this cause came on to be heard and tried before the Hon. Addison Brown, judge of the said district court, with the allegations and proofs adduced by the respective parties upon the issues raised, and the said judge having — advised upon the said allegations and proofs, on or about the twenty-eighth day of February, 1887, made an interlocutory decree herein, that the said libellants recover against the said barkentine Freda A. Willey, one-half their damages sustained by reason of the said collision and referring
211 it to a commissioner of this court to ascertain the amount of said damages, as will more fully appear by reference to the said interlocutory decree.

Thereafter, and on or about the twenty-second day of March, 1888, and afterwards, from time to time, as such hearing was adjourned, said reference to ascertain the damages of these appellants came on and was heard before Samuel A. Blatchford, Esq., the commissioner appointed by said interlocutory decree for that purpose, who, on or about the fifteenth day of October, 1888, made his report herein, in and by which he finds such damages to be the sum of $6,156.70, including interest to the date of said report, as will more fully appear by reference thereto.

Thereafter, and on or about the nineteenth day of December, 1888, a final decree was made by the said judge of said district court, bearing date on that day, in and by which it was adjudged that the said libellants recover of the said steamer Martello, one-half their said damages, and one-half their costs, amounting together to the sum of $3,418.70, and that said barkentine be condemned therefor, as will more fully appear by said decree, to which these appellants pray reference.

And these appellants are advised and insist that the said decree made in the said cause against the said barkentine, inasmuch as these appellants were entitled to a decree against the said barkentine and said claimants for the full amount of their damages, and condemning said barkentine to pay the same.

And these appellants, for these and other reasons, appeal from the whole of said final decree to the next circuit court to be held within and for the southern district of New York, in the second circuit, and on the said appeal, these appellants intend to seek a new decision on the facts on the proceedings and proofs in the
212 said district court, and on other proofs to be adduced in the said circuit court, and for additional and further relief.

And these appellants pray that the said final decree, and each and every part thereof, may be reversed with costs, and that such other decree may be made thereupon, as the said circuit court shall deem

just, and the said appellees condemned to pay to these appellants their costs and damages in the premises.

And these appellants will ever pray, &c.

Dated New York, January 10, 1889.

FOSTER & THOMSON,
Proctors for Appellants, 52 Wall Street, N. Y.

213 U. S. District Court, S. D. of New York.

ICHABOD WILLEY
vs.
THE BRITISH STEAMER "MARTELLO," &c.

CHARLES HENRY WILSON and Another
vs.
THE BARKENTINE "FREDA A. WILLEY," &c.

Foster & Thomson, for the "Martello;" Goodrich, Deady & Goodrich, for the "Willey."

BROWN, *J.:*

On the 8th day of May, 1887, the steamer "Martello," of the Wilson line, 370 feet long, and 2,439 net tons, bound from New York to Hull, came into collision, a little before eight o'clock in the morning, a few miles outside of Sandy Hook, with the barkentine "F. A. Willey," bound from Pensacola into the harbor of New York. At the time of the collision a thick fog prevailed. The wind was about east by north, and the barkentine, heading north, on her starboard tack. The steamer was heading E. S. E. and struck the barkentine on her port bow, crushing in her timbers, and bringing up against the keel and bowsprit, which were knocked to starboard. The injuries to the Martello were comparatively slight. The above
214 cross-libels were filed by the respective owners to recover their damages; each alleging that the other was going at too great speed in a fog, and did not maintain a proper lookout. The Willey also charges, as a fault against the Martello, that she did not indicate by her whistles which way she would turn; and the steamer also charges that the Willey did not properly sound her fog-horn.

It is impossible to hold the collision in this case the result of inevitable accident. The circumstances are not sufficient to show that it could not have been avoided by the use of reasonable prudence, diligence and nautical skill. (The Morning Light, 2 Wall., 550, 558.)

The case is, however, somewhat peculiar in that both vessels were going at a comparatively low rate of speed, less than has usually, in cases of collision in a fog, been found to have been the speed of one or the other of the vessels. Each side accordingly claims that the speed of its own vessel was within the limit required by the rules of navigation; and each, no doubt, in this respect, makes a somewhat close case. Upon repeated consideration, however, I am satisfied that neither vessel discharged her whole duty in this re-

spect, having reference to the special circumstances of the situation.

The speed of the Martello is to be deduced partly from the direct testimony and partly from the distance run, and the time that elapsed after discharging the pilot a little to the westward of the perch and ball buoy, until the collision. On this subject there is a great amount of testimony; and in the latter stages of the cause an endeavor was made on the part of the steamer to weaken the force of the previous evidence of her officers, and of the entries in the engineer's log, as well as the private entries of Maider, the second engineer. There is nothing that I can find, however, in this later evidence
215 that deserves any greater confidence than the testimony previously given and the entries referred to, which are verified with perfect clearness and positiveness by the witness who made them at the time. The case on the part of the steamer is in many respects—such as the alleged errors of the log, the alleged dead-slow speed, the need of keeping steerage-way, and being nearly stopped at the collision—similar to that of Dordogne (10 Prob., Div., 6), in which the steamer was held liable. In that case, however, there were some circumstances favorable to the steamer which are not found here.

Without discussing the details of the evidence, the most reliable testimony, including that of the master, satisfies me that the pilot was discharged at least half a mile to the westward of the perch and ball buoy, *i. e.*, about north from the black buoy No. 1; that the engine was stopped at 7.03 a. m., for the purpose of slowing the vessel until the pilot could be discharged; that the pilot left and the engines were again moved slow ahead at 7.10; that the place of collision, best fixed by the pilot Wolff, was 1¾ miles from N. to N. N. E., say about N. by E. from Sandy Hook light-ship, and upwards of 4 knots from the point where the pilot was discharged. That at 7.50, 40 minutes after the pilot was discharged, the engines were ordered full speed astern, when the barkentine was first seen from 600 to 1,500 feet distant, and that the engines continued full speed astern till about 7.56, soon after the collision, were then slowed, and were stopped at 7.58. This would make the speed of the steamer, when first seen, from 5½ to 6 knots.

Again, the full speed of the steamer was about 12 knots, with about 58 revolutions. The engineer testifies that at 7.10, when moving slowly ahead, she was put at 28 revolutions, and at 7.20, when ordered to go as slow as possible, the engines were put at 24 revolutions. As the "slip" is less when the vessel is running at
216 slow speed than when running at high speed, 24 revolutions should, I think, give a little over 5 knots (White Nav. Arch., 548).

From the second engineer's entries, moreover, and from the estimate of the witnesses, it would appear that the engine must have been backing full speed for about two minutes before the collision. The estimated time from the order to reverse to the collision is put at not less than from 2½ to 3½ minutes. As this was a new steamer, with all the modern appliances, "her gear working quick," no such

length of time for getting the engine reversed after the order to reverse was given can be admitted as estimated upon the evidence in the case of the Lepanto (21 Fed. Rep.,, 651, 653). One-third of a minute is more than sufficient to a steamer having the modern appliances, assuming a reasonable prompt obedience to orders, and that the vessel was previously running "slow." No delay in reversing fully and at once is in that case necessary. Had the steamer not been going over 4 knots when the order to reverse was given, and if that order was properly obeyed, she would have been very near, if not quite, at a dead stop at the time of collision. (See the Aurania, 29 Fed. Rep., 121 note.) It is not claimed that she was wholly stopped; and the depth of the wound in the bow of the Willey, and the great swing of the Willey's bows to the southward are sufficient evidence to the contrary. Mr. Wolff, the expert and mechanical engineer, estimated the speed of the Martello at the collision at not over two knots. Upon all the other testimony I should ar-ive at about the same conclusion, and such is the first officer's estimate. I do not regard that speed as insufficient to cause the injuries proved to have been inflicted upon the Willey. The length of time that she was *was* backing without reducing her speed below two knots at the moment of collision is strong corroboration of what is to be inferred from the other testimony, that she
217 was going from 5 to 5½ knots when the order to reverse was given. The pilot, Wolff, who was acquainted with the handling of the steamer, testifies that if previously going only five knots, and if her full speed were twelve knots, she would be stopped dead on reversing the engines full speed in going from 200 to 250 feet. If this estimate is accurate, the steamer would have been backing full speed only about one minute. I think the estimate too small, and that she was backing from a minute and a half to two minutes, reducing her speed from about 5 or 5½ knots to about two knots in going from one to two lengths.

I cannot hold a speed of about five knots under the special circumstances of this case to be such "moderate speed" as to free the steamer from blame. There was special need of very great caution; because the steamer's course in that vicinity, only a short distance outside of the bar, was likely to encounter incoming vessels; and because the lightening up on the morning of the 8th of the fog which had prevailed the previous day was likely to bring many vessels near the entrance of the harbor, and the horns of other vessels were in fact heard. It had been clear in the morning, but had again shut down thick soon after the pilot left, about forty minutes before the collision. The engineer, indeed, says that the Martello only had steerage-way; but he was not the proper officer to testify to such a fact; and from his own testimony it appears that the engine could have been run more slowly than twenty-four revolutions. If the fog was so thick that the Willey could not be seen more than from 250 to 700 feet, as most of the Martello's witnesses testify, her speed was not "moderate" within the decisions; because she could go slower, and it was impossible with her speed to avoid any crossing vessel within that distance. The Colorado, 91

U. S., 692; The Pennsylvania, 19 Wall., 133; The Nacoochee,
218 22 Fed. Rep., 855; 28 do., 462; The Pottsville, 12 Fed. Rep., 633; McCabe *vs.* Old Dominion S. S. Co., 31 do., 234.

In the thick fog that prevailed, and in the expectation of vessels approaching New York harbor, which ought to have been anticipated, it was the further duty of the steamer to stop her engines at once, when the fog-horn of the Willey was first heard off her starboard bow. From the direction of the wind it was to be inferred that the sailing vessel whose horn was heard was probably crossing the steamer's course. It was plain that the horn could not be far off. Until the position and course of the vessel whose fog-horn was heard near was definitely known, it was incumbent on the steamer to stop her engines, and to do so at once. The Lepanto, 21 Fed. Rep., 651, 659; The Geo. D. Fisher, 21 How., 1, 6; The City of Atlanta, 26 Fed. Rep., 461–'2, and cases there cited; The Ebor, 11 Prob. Div., 25; The Falkland, L. R., 4 Priv. C. 529, 533–534; The Dordogne, 10 Prob. Div., 6.

In the case of the Ebor, the steamer, though going at the rate of from 3 to 3½ knots only, was held in fault because she did not stop at once, on hearing the first signal from the other vessel. According to the testimony of the witnesses for the Martello the time was doubtless quite short between hearing the first horn from the Willey and her coming into view. But it is evident that there was some interval. The lookout of the Martello in the crow's nest and one of the men on the forecastle estimate it at least one minute. The master and the first mate, who was on the forecastle, both heard the horn; but it is clear that the orders "hard-a-port" and "reverse the engine" were not given until after the mate had seen the Willey on the starboard bow, and ordered hard-a-port. Both were asked what they did upon hearing the horn; and the answer
219 is only as to what was done after the Willey was seen, when the mate's order was given immediately. In another place *and* the mate says: "I sung out the fog-horn first, and as she came in sight, I sung out 'hard-a-port.'" All these circumstances point to a very appreciable interval after the fog-horn was heard near, and "nearly ahead," as one of the witnesses says, and before the order to stop was given. It appears further on cross-examination, that the two men on the forecastle with the mate were more or less engaged in overhauling the chain and anchor, which the first officer was superintending. This circumstance, together with the very much less distance at which they estimate the Willey when first seen, than the estimate testified to by all the Willey's witnesses, affords ground to doubt whether a sharp lookout was kept as required. Upon these various considerations the Martello must be held to blame.

2. The Willey's speed was estimated by the Martello's witnesses at five knots, but by her own witnesses at only four. The latter are sustained by the rate given by the patent log. The breeze, it is true, was estimated as a five- or six-knot breeze; but the Willey was well loaded, and had only about three-fourths of her canvass set; it having been reduced by hauling up the foresail, as the breeze fresh-

ened. I think that she was not making much, if any, over four knots.

By article 13 of the New International Rules, the duty to go at "moderate speed" in a fog, is imposed equally upon sailing ships and on steamships. "Every ship," says the rule, "whether a sailing ship or a steamship, shall, in a fog, mist or falling snow, go at moderate speed." Prior to the adoption of this article, the duty of sail-vessels to slacken speed in a fog, or in thick weather, had been recognized and enforced as a rule of prudent navigation. In the case of the John Hopkins (13 Fed. Rep., 185), where, upon a collision in a fog between a steamer going at three and
220 & 221 a half knots, and a sailing vessel going twice as fast, the collision was held solely the fault of the sailing vessel.

It was also applied in this court in the case of the Rhode Island (17 Fed. Rep., 554), where the schooner was held in fault for sailing in Long Island sound in a fog, at the rate of seven knots. In navigation in the open sea, or on the lakes, where other vessels are not to be specially looked for, a rate of four knots for a sail-vessel has been held not a fault. The Colorado, 91 U. S., 692. The Leland, 19 Fed. Rep., 771. In the Elysia (4 Asp., 540), a speed of five and a half knots in a fog, it is — would not be moderate. In the Zadok (9 Prob. Div., 114), a speed of five knots was held not moderate speed in a fog, in the English Channel. In the Victoria (3 Wm. Rob., 49), a speed of six knots in a dark night, without fog, was held immoderate; the same in the Pepperell (Swabey, 12). In all these cases the sailing vessel was held bound to heed all the special circumstances of danger, and to moderate her speed accordingly. In the case of the Zadok, *supra*, Sir James Hannen, the president of the admiralty division, held it the duty of the sailing vessel in a thick fog to moderate her speed down to the standard of sufficient way to control her movements, "to as low a rate as is consistent with keeping a good steerage-way." This duty was affirmed by Lord Escher, in the court of appeal, in the case of the Dordogne (10 Prov. Div. 6, 12), where he says: "As the steamer, by her whistle, is perceived to be coming nearer in a fog, the sailing vessel ought, if she is under full sail, to take sail off, until she brings herself as nearly to a standstill as is possible, whilst being under command." In the Ebor and other cases, *supra*, similar language is used as to the duty of steamers.

In the present case, the circumstances above referred to required special caution on the part of the sailing vessel, as well as of the steamer. The speed which would have been moderate and
222 justifiable farther out at sea, was imprudent in a thick fog, just outside of New York harbor, at a time and place where many other sailing vessels were to be expected to be approaching, and steamers to be departing, upon courses crossing the Willey's at nearly right angles. The Willey had about three-fourths of all her canvass set. She had by no means brought her speed "down to the standard of good steerage-way." On the contrary, she was going at nearly full speed. She hauled up her foresail a while be-

fore, not to diminish her speed, but to avoid increasing it, as the breeze was freshening. Four knots for her was equivalent to eight knots for the steamer, relatively to her maximum speed, as well as to her ability to keep out of the way of other vessels that she might be bound to avoid. Two such sail-vessels crossing at her speed in such a fog would be likely to come into collision in spite of anything that either or both could do after they had sighted each other. Such navigation was not prudent or reasonable, and therefore not "moderate" in a situation where many other ships, sail-vessels as well as steamers, were likely to be met, some of which it might be her duty to avoid. She was bound in such a place to moderate her speed within the limits of fair steerage-way, so that she could do her share in avoiding collision after the danger of it was perceived. As observed in the case of the Rhode Island (17 Fed. Rep., 554, 559), if the speed of the sailing vessel would not be prudent or justifiable or moderate as respects other sailing vessels that she was likely to meet, and out of whose way she would be bound to keep, the same rule must be applied and her speed be held not moderate, though the other vessel be a steamer. Though she may have the right of way, she has no right to increase the burden that falls on the steamer to keep out of the way.

223 It was a further fault in the Willey that after hearing the steamer's several whistles coming nearer, she did not even then take any steps to check her speed, or do anything to avoid collision. In the case of the Zadok (9 Prob. Div., 117), Sir James Hannen says: "Though the whistle of the Iduna was heard once, and twice, and thrice, yet no precaution whatever was taken on board the Zadok to guard against a contingency which she was warned might happen, of a steamer being in a position which required caution. I am advised that what ought to have been done was this: that men should have been stationed so as to work on the braces and to put the foresails aback by letting them fly; they would come at once aback and would tend to throw off the ship's head, by putting the helm to starboard, and when the vessel was seen * * * there would have been time for them to effectuate that manœuvre, which might have had the effect of avoiding the collision altogether. Instead of that, no preparation was made to do anything on board the Zadok. Those on board seem to have thought that she, being a sailing vessel, and the other being a steamer, the former had a right to keep her course and do nothing. That is not the view I take, nor the view which I am advised should be taken." These observations are in the main applicable to the present case. And as respects the right of the sail-vessel to hold her course, as against a steamer, the Supreme Court, in Peck *vs.* Sanderson (17 How., 178, 182), say: "Where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object."

The master states that he would have ported his helm, and could have avoided the collision if the steamer had given him these sig-

nal whistles to indicate that she was backing; and it is
224 charged as a fault against the steamer that she did not give these signals. But as article 19 of the new regulations expressly declares that the "use of these signals is optional," it is not in itself, independently considered, a fault that they were not given. Notwithstanding the fact, however, that the signals are made optional, when their great utility in promoting a mutual understanding between a steamer and a sailing vessel comes to be better understood, it may then be a legal duty on the part of the steamer, as one of the obligations of reasonable prudence, to give those signals whenever the situation is such that the steamer cannot alone avoid collision; and when the steamer knows, or ought to know, that the other vessel, guided by such signals, but not without them, might safely change her course, so as to avoid disaster. I do not need to pass on that question now. In the situation of these two vessels, the master of the Willey, without knowing whether the steamer intended to go ahead of him or astern, or even whether she had reversed her engines (in which latter case the steamer could not materially change her course), could not prudently change his own course in time to be of any service. I cannot, therefore, hold the Willey in fault on that ground.

The cases in which steamers fail to hear the fog-horns of sailing vessels until quite near are too frequent to warrant the inference that the horn was not properly blown because not sooner heard. For the Willey's speed, however, in that situation, and for her failure to attempt to check it after the approaching whistles of the steamer were several times heard near in the thick fog, I must hold her to blame, and the damages and costs must, therefore, in both cases be divided.

225 At a stated term of the United States circuit court for the southern district of New York, held at the court-rooms thereof, in the city of New York, on the 16th day of July, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants and Respondents,
against
THE BARKENTINE "FREDA A. WILLEY," HER TACKLE, &c., Whereof William H. Parsons and Others are Claimants and Appellants.

The appeal in this case coming on to be heard, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, it is now, on motion of Goodrich, Deady & Goodrich, proctors for the claimants and appellants—

Ordered, adjudged, and decreed by the court that the decree of the district court herein be, and the same is hereby, in all things reversed, and that the libel of the libellants and respondents herein be, and the same is hereby, dismissed, with costs in the district

court and in this court, to be taxed; and the claimants' costs in the district court and in this court having been duly taxed at the sum of $184.25, it is now, on like motion—

226 Ordered, adjudged, and decreed by the court that William H. Parsons and others, claimants of the "Freda A. Willey" herein, recover of the libellants, Charles Henry Wilson and Arthur Wilson, the sum of $184.25 costs as taxed, and that they have judgment and execution therefor, and it is, on like motion, further—

Ordered that unless this decree be fulfilled or satisfied or proceedings herein are stayed by an appeal within ten days after the service of a copy of this decree on the libellants' proctors that the libellants' stipulators, on their stipulation for costs in the district court, and their sureties, on the bond on appeal in this court, show cause before the court within four days after the expiration of said ten days or on the first day of jurisdiction thereafter why execution should not issue against them, their goods, chattels, and lands.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, S. D. of N. Y. Charles Henry Wilson and ano. against The Barkentine "Freda A. Willey." Final decree. Goodrich, Deady & Goodrich, claimants' proctors, 59 Wall street, New York, Brown Bros. building. U. S. circuit court. Filed Aug. 20, 1890. John A. Shields, clerk.

227 At a stated term of the United States circuit court for the southern district of New York, held at the court-rooms thereof, in the city of New York, on the 16th day of July, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

ICHABOD WILLEY, Libellant and Appellant,
against
THE STEAMSHIP "MARTELLO," HER ENGINES, &c., Whereof Charles Henry Wilson and Arthur Wilson are Claimants and Respondents.

The appeal in this case coming on to be heard and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, it is now, on motion of Goodrich, Deady & Goodrich, proctors for the libellant and appellant—

Ordered, adjudged, and decreed by the court that the decree in the district court herein be, and the same hereby is, in all things reversed; and on like motion it is—

Ordered, adjudged, and decreed that the libellant and appellant recover of the steamship "Martello," her engines, boilers, tackle, apparel, and furniture, whereof Charles Henry Wilson and Arthur Wilson are claimants, the amount of his damages sustained by reason of the facts and things in his libel alleged as have

228 been ascertained and computed by Samuel A. Blatchford, a commissioner duly appointed herein in the district court, together with his costs in this court, to be taxed, and the costs in the district court as taxed; and the amount of the libellant and

appellant's damages having been ascertained and computed by the commissioner in the district court at the sum of $20,304.34, and the costs of this court having been duly taxed at the sum of $429.67, and the costs as taxed in the district court amounting to the sum of $822.95, now, on like motion, it is—

Ordered, adjudged, and decreed by the court that Ichabod Willey, the libellant and appellant herein, recover of the steamship "Martello," her engines, boilers, tackle, apparel, and furniture, whereof Charles Henry Wilson and Arthur Wilson are claimants, $20,304.34, the amount of his damages, with $2,131.96 interest from October 15th, 1888, the date of the commissioner's report, with the sum of $822.95 costs in the district court, with $77.36 interest from December 21st, 1888, the date of the entry of the decree in said court, with the sum of $429.67 costs in this court, making in all the sum of $22,943.43, and that the said steamship, her engines, boilers, tackle, and apparel, be condemned therefor, and that the said libellant and appellant have judgment against the said claimants and execution therefor; and, on like motion, it is further—

Ordered that unless this decree be fulfilled or satisfied or
229 proceedings herein are stayed by an appeal within ten days after the service of a copy of this decree on the claimants' proctors, that the claimants' stipulators on the stipulations for value and for costs in the district court and their sureties on the bond on appeal in this court show cause before the court within four days after the expiration of said ten days or on the first day of jurisdiction thereafter why execution should not issue against them, their goods, chattels, and lands.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, S. D. of N. Y. Ichabod Willey against The Steamship "Martello," &c. Final decree. Goodrich, Deady & Goodrich, libellant's proctors, 59 Wall street, New York, Brown Bros.' building. U. S. circuit court. Filed Aug. 20, 1890. John A. Shields, clerk.

230 Circuit Court of the United States for the Southern District of New York.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants and Appellants,
v.
THE BARKENTINE "FREDA A. WILLEY," HER Tackle, etc., William H. Parsons *et al.*, Claimants, Respondents and Appellees. } In Admiralty.

To the Supreme Court of the United States:

The appeal of the claimants and appellants, Charles Henry Wilson and Arthur Wilson, respectfully shows—

That on or about the twenty-fifth day of May, 1887, they filed their cross-libel in the district court of the United States for the southern district of New York against the barkentine Freda A.

Willey, her tackle, etc., in a cause of collision, civil and maritime, for the recovery of their damages sustained to the steamer Martello by reason of a collision with said barkentine, and that the above-named William H. Parsons *et al.* thereafter filed their claim and stipulations; that, by stipulation between the proctors for the parties, it was consented that the libel filed by Ichabod Willey against the said steamer Martello should stand and be considered as
231 the answer of the claimants in this cause, and such proceedings were thereafter had that on or about the eighteenth day of December, 1888, a final decree was made and pronounced therein by the said district court, whereby it was in substance adjudged that these appellants recover of said barkentine Freda A. Willey one-half their damages and costs, amounting to three thousand four hundred and eighteen $\frac{47}{100}$ dollars.

That these appellants duly appealed from said decree to the circuit court of the United States for the southern district of New York, and the said cause was thereby removed into the said circuit court and there tried anew, and such proceedings thereafter had that, on the sixteenth day of July, 1890, the said circuit court made a final decree in the said cause whereby it was decreed that said decree of the district court be reversed and said libel dismissed and that the said appellees recover their costs in the district and circuit courts, amounting to $184.25, from these appellants, and that the stipulators show cause why execution should not issue; which decree is, as these appellants are advised, erroneous and ought to be reversed.

Wherefore these appellants appeal from said decree and from each and every part thereof to the Supreme Court of the United States, and pray that the said decree of said circuit court and the libel, answer, bill of exceptions, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and
232 that said Supreme Court will proceed to hear said cause, and that said decree of said circuit court and each and every part thereof may be reversed and a decree made that these appellants recover their damages and costs, or such other decree as to said Supreme Court shall seem just.

Dated August 21, 1890.

FOSTER & THOMSON,
Proctors for Appellants.

JAMES THOMSON, *Advocate.*

The foregoing appeal is hereby allowed.
N. Y., Aug. 27, 1890.

E. HENRY LACOMBE,
Circuit Judge.

233 Endorsed: U. S. circuit court, southern dist. of N. Y. Charles Henry Wilson *et al. v.* The Barkentine Freda A. Willey. Petition of appeal. Foster & Thomson, proctors for app'l'ts, 52 Wall St., N. Y. Due service of copy within petition admitted Aug. 29, 1890. Goodrich, D. & G., proctors for Willey. U. S. circuit court. Filed Aug. 29, 1890. John A. Shields, clerk.

234 Circuit Court of the United States for the Southern District of New York. In Admiralty.

ICHABOD WILLEY, Libellant and Appellant,
vs.
THE BRITISH STEAMER "MARTELLO," HER ENGINES, ETC.; CHARLES Henry Wilson and Arthur Wilson, Claimants, Respondents and Appellees.

To the Supreme Court of the United States:

The appeal of the above-named Charles Henry Wilson and Arthur Wilson, claimants and owners of the British steamship "Martello," her engines, etc., and respondents and appellees in the above-entitled cause, respectfully showeth as follows:

That heretofore and on or about the twelfth day of May, one thousand eight hundred and eighty-seven, the above-named libellant and appellant filed his libel in the district court of the United States for the southern district of New York against the British steamship Martello, her engines, etc., in a cause of collision, civil and maritime, for the recovery of damages alleged to have been sustained to the barkentine Freda A. Willey by collision with the said steamship Martello, and that said steamship was ar-
235 rested upon process issued upon said libel, and was discharged upon the filing of petitioner's claim and stipulations.

That thereafter by stipulation between the proctors for the parties it was consented that the cross-libel filed by petitioners against the said barkentine Freda A. Willey should stand and be considered as the answer of petitioners to the libel of said Willey, and such proceedings were thereafter had that on or about the nineteenth day of December, 1888, a final decree was made and pronounced therein by the said district court, wherein it was in substance adjudged that the libellants recover of the said steamship Martello one-half his damages by reason of the collision and one-half of the costs of said cause, together amounting to ten thousand six hundred and seventy-one $\frac{98}{100}$ —.

That after such final decree both parties duly appealed therefrom to the circuit court of the United States for the southern district of New York, and the said cause was thereby removed into the said circuit court and there tried anew, and such proceedings were thereafter had in the said circuit court that on the sixteenth day of July, 1890, the said circuit court made a final decree in the said cause whereby it was decreed that the said decree of the district court be reversed, and that said libellant recover his damages and costs in the district and circuit courts, amounting to twenty-two thousand nine hundred and forty-three dollars and forty-three cents,
236 and that the stipulators show cause why execution should not issue; which said decree of said circuit — is, as these appellants are advised, erroneous and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and

pray that said decree of said circuit court and the libel, answer, bill of exceptions, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that said Supreme Court will proceed to hear said cause, and that said decree of said circuit court and each and every part thereof may be reversed and a decree made dismissing said libel with costs, or such other decree as to said Supreme Court shall seem just.

Dated August 21, 1890.

FOSTER & THOMSON,
Proctors for Appellaxts.

JAMES THOMSON, *Advocate.*

The foregoing appeal is hereby allowed.

E. HENRY LACOMBE,
Circuit Judge.

N. Y., Aug. 27, 1890.

237 Endorsed: U. S. circuit court, southern dist. of N. Y. Ichabod Willey *v.* The British S. S. Martello. Petition of appeal. Foster & Thomson, proctors for app'l'ts, 52 Wall St., N. Y. Due service of copy within petition admitted Aug. 29, 1890. Goodrich, D. & G., proct. for Willey. U. S. circuit court. Filed Aug. 29, 1890. John A. Shields, clerk.

238 Circuit Court of the United States for the Southern District of New York. In Admiralty.

ICHABOD WILLEY, Libellant and Appellee,
v.
THE BRITISH STEAMER MARTELLO, HER ENGINES, ETC.; CHARLES HENRY WILSON and ARTHUR WILSON, Claimants and Appellants.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants and Appellants,
v.
THE BARKENTINE FREDA A. WILLEY, HER TACKLE, ETC.; WILLIAM H. PARSONS *et al.*, Claimants and Appellees.

Know all men by these presents that we, Charles Henry Wilson and Arthur Wilson, John Miner and Joseph Henderson, are held and firmly bound unto the above-named Ichabod Willey and William H. Parsons *et al.* in the sum of twenty-five thousand dollars and interest from date to be paid to them; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the twenty-second day of August, one thousand eight hundred and ninety.

239 Whereas the appellants above named have prosecuted appeals to the Supreme Court of the United States to reverse

the final decrees rendered in the above causes by the circuit court of the United States for the southern district of New York:

Now, the condition of this obligation is such that if the above-named appellants shall prosecute their appeals to effect and answer all damages and costs if they fail to make their appeals good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

JOSEPH HENDERSON, [SEAL.]
JOHN MINER, [SEAL.]
CHARLES HENRY WILSON, [SEAL.]
By HAROLD A. SANDERSON, *Att'y.*
ARTHUR WILSON, [SEAL.]
By HAROLD A. SANDERSON, *Att'y.*

Sealed and delivered and acknowledged before me this 22nd day of August, 1890.

D. C. ANDREWS,
Notary Public, # 81, *New York.*

As to John Miner, August 23rd, 1890.

GIRAUD F. THOMSON,
Notary Public, New York County.

Signed, sealed, and acknowledged in the presence of—
ADRIAN H. BOYLE,
Notary Public, 138,
As to Chas. Henry & Arthur Wilson.
N. Y., Aug. 25, '90.

240 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

John Miner and Joseph Henderson, being duly sworn, each for himself says that he is worth the sum of twenty-five thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under an execution.

JOSEPH HENDERSON.
JOHN MINER.

Sworn to this 22nd day of August, 1890, before me—
D. C. ANDREWS,
Notary Public, # 81, *New York.*

Sworn to before me this 23d day of August, 1890.
GIRAUD F. THOMSON,
Notary Public, New York County,
As to Mr. John Miner.

The foregoing bond is hereby approved as to the form thereof and the sufficiency of the sureties thereon.
Dated Aug. 23, 1890.

GOODRICH, DEADY & GOODRICH,
Proctors for "Freda A. Willey" and Her Owners, Appellees.

I approve the foregoing bond and the sufficiency of the sureties thereon.

Dated Aug. 27, 1890.

E. HENRY LACOMBE.

241 Endorsed: U. S. circuit court, southern district of N. Y. Ichabod Willey *v.* The British S. S. Martello, &c. Charles Henry Wilson *et al. v.* The Barkentine Freda A. Willey. Bond on appeal. Foster & Thomson, proctors for app'l'ts, 52 Wall St., N. Y. U. S. circuit court. Filed Aug. 27, 1890. John A. Shields, clerk.

242 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States, in the second circuit, to Ichabod Willey and William H. Parsons *et al.:*

Whereas Charles Henry Wilson and Arthur Wilson, claimants of the British steamship Martello, her engines, etc., and owners of said steamship, etc., have appealed to the Supreme Court of the United States from two certain decrees lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, one made in favor of you, the said Ichabod Willey, against said steamship Martello, etc., and the other made in favor of you, the said William H. Parsons *et al.*, against said Charles Henry Wilson and Arthur Wilson, and has filed the security required by law—

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 27th day of August, A. D. 1890, and of the Independence of the United States the one hundred and fifteenth.

E. HENRY LACOMBE.

243 Endorsed: United States circuit court, southern district of N. Y. Ichabod Willey *v.* The British S. S. Martello, &c. Charles Henry Wilson *et al. v.* The Barkentine Freda A. Willey, &c. Citation. Foster & Thomson, proctors for app'l'ts, 52 Wall St., N. Y. Due service of copy of within citation admitted Aug. 29, 1890. Goodrich, D. & G., proctors for Willey. U. S. circuit court. Filed Aug. 29, 1890. John A. Shields, clerk.

244 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 243, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cases of Ichabod Wil-

Seal of U. S. Circuit Court, South. Dist. New York.

ley, libellant and appellee, *vs.* The British Steamer Martello, her engines, etc., Charles Henry Wilson and Arthur Wilson, claimants and appellants, and Charles Henry Wilson and Arthur Wilson, libellants and appellants, *vs.* The Barkentine Freda A. Willey, her tackle, etc., William H. Parsons *et al.*, claimants and appellees, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 16th day of October, in the year of our Lord one thousand eight hundred and ninety and of the Independence of the said United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,334. S. New York C. C. U. S. No. 293. The British Steamship "Martello," &c., Charles Henry Wilson and Arthur Wilson, claimants, appellants, *vs.* Ichabod Willey and William H. Parsons *et al.* Filed October 18, 1890.

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MAR 15 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1893.—No. 293.

THE BRITISH STEAMSHIP, "MARTELLO," &c.; CHARLES HENRY WILSON and ARTHUR WILSON, Claimants, Appellants,

vs.

ICHABOD WILLEY and WILLIAM H. PARSONS et. al.

Appeals from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE APPELLANTS.

J. HUBLEY ASHTON,
DAVID THOMSON,
Of Counsel for Appellants.

FOSTER & THOMSON,
Proctors for Appellants.

Press of McGILL & WALLACE, 1107 E Street N. W.

Supreme Court of the United States.

October Term, 1893. No. 293.

THE BRITISH STEAMSHIP MARTELLO, ETC., CHARLES HENRY WILSON AND ARTHUR WILSON,
Claimants, Appellants,

vs.

ICHABOD WILLEY AND WILLIAM H. PARSONS ET AL.,
Respondents.

Appeals from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

These are appeals from decrees of the Circuit Court of the United States for the Southern District of New York, entered on August 20, 1890, reversing decrees of the District Court of the United States for the Southern District of New York, entered on the 18th and 19th of December, 1888, and directing in one case that the respondent, Ichabod Willey, recover damages in both District and Circuit Courts amounting to $22,943.43, and in the other case that the libel of these appellants be dismissed, and that said respondent, Willey, recover costs of the District and Circuit Courts, amounting to $184.25.

These decrees were entered on cross libels in admiralty, filed to recover damages sustained by the barkentine, *Freda A. Willey*, and the steamer *Martello*, by reason of a collision between said vessels on the morning of May 8, 1887.

The steamer Martello is a British steamship of 2,439 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, belonging to the *Wilson Line* of steamers plying between New York and Hull and other foreign ports, and owned by the appellants, Charles Henry Wilson and Arthur Wilson.

The barkentine *Freda A. Willey* is 150 feet in length, 33.4 feet beam, and 17.5 feet in depth. She sailed from Pensacola, Florida, bound for New Haven, with a cargo of pine lumber, and at four o'clock on the morning of the collision was 20 miles to the southward of the Sandy Hook lightship, and about 22 miles from the place of collision. (Record, fols. 147, 139.)

The *Martello* left her dock on the afternoon of Saturday, May 7, 1887, bound for Hull, England, with a miscellaneous cargo. The weather was foggy, and she anchored for the night in Gravesend Bay. About 6 o'clock the next morning, May 8, she got under way and started for sea. She was commanded by Captain Francis Eldon Jenkins, the "commodore" of the New York service of the Wilson Line, had a full complement of officers and men on board, and was in charge of pilot Joseph Henderson, who had been a New York and Sandy Hook pilot for nearly forty-two years. (Record, fol. 144.)

The weather at the time was thick, but it was sufficiently clear for the pilot to see the buoys in the channel, and the vessel arrived without mishap at the entrance to Gedney's Channel, and while half a mile to the westward of the perch and ball buoy, and about north from the black buoy No. 1, the vessel was slowed

to permit the departure of the pilot. After the pilot was discharged, and about 7.10 a. m., the engines were moved *slow ahead.* (Rec., fol. 136.)

The fog had grown much denser and vessels could not be seen more than a quarter of a mile away. The captain and third officer of the *Martello* were on the bridge, a competent lookout was in the cro'nest, the first officer was on the lookout on the forecastle, and a quartermaster was at the wheel; and the whistle of the steamer was blown regularly at intervals of thirty seconds or less.

About 40 minutes after discharging the pilot, or about 7.50 a. m., *one blast* of a horn from a sailing vessel was heard by those on the *Martello* from a point on her starboard bow, and very soon, almost immediately, after hearing the horn, the officers of the *Martello* saw the barkentine, *Freda A. Willey*, looming in sight through the thick fog.

As soon as the *Willey* loomed in sight of those on the *Martello*, the first officer of the steamship called out hard-a-port, and the lookout reported a vessel on the starboard bow; and the captain immediately ordered the helm hard-a-port and the engines reversed *full speed.*

The speed of the *Martello* under a hard-a-port helm and with the engines reversed at full speed, became gradually reduced, but a collision was inevitable so far as any action on the part of the steamer was concerned, and the vessels collided, and both were damaged.

A libel *in rem* was filed in the District Court of the United States for the Southern District of New York, by Ichabod Willey, master of the barkentine, against the steamship *Martello*, to recover the amount of the damage to the barkentine and cargo by reason of the collision. (Rec., pp. 1, 2.) A cross libel was also filed in that Court by Charles Henry Wilson and Arthur Wilson, composing the firm of Thomas Wilson, Sons

and Company, of Hull, owners of the *Martello*, against the barkentine *Freda A. Willey*, to recover the damages sustained by them on account of the collision. (Rec., pp. 3, 4.)

By stipulations the cross libel was taken as the answer to the libel, and *vice versa*. (Rec., pp. 3, 5.)

Judge Brown, the learned Judge of the District Court, held both vessels in fault; the steamer for proceeding in the fog at a speed which he thought was not such "moderate" speed as to free her from blame; and the barkentine for sailing at an immoderate or imprudent speed in the fog, just outside of New York harbor, at a time and place when and where many other sailing vessels were expected to be approaching, and steamers to be departing upon courses crossing the *Willey's* path at right angles, and also for taking no measures to check her speed or avoid the collision, after the approaching whistles of the steamer were several times heard coming nearer and nearer to her.

The District Judge accordingly decided, under the admiralty rule, that the damages and costs must, in both cases, be equally divided.

The opinion of Judge Brown is in the Record (pp. 117–123), and is reported in *34 Fed. Rep.*, *71*.

Interlocutory decrees were entered in the District Court to the effect that the libellants respectively recover one-half of their damages and costs, and referring it to a Commissioner to ascertain and report the amount of the damages. (Rec., pp. 106, 107.)

On the report of the Commissioner, a final decree was entered in the District Court, December 19, 1888, in favor of Ichabod Willey, libellant, against the steamer *Martello*, for $10.671.98, being one-half of his damages and interest, and one-half of the taxed costs in the suit. (Rec., p. 107.)

On the Commissioner's report a final decree was also entered in the District Court in favor of Charles Henry Wilson and Arthur Wilson, libellants, against the barkentine *Freda A. Willey* for the sum of $3,418.47, being one-half of their damages and interest, and one-half of the taxed costs in the suit. (Rec., p. 108.)

Both of the parties in each suit appealed from the final decree therein to the Circuit Court of the United States for the Southern District of New York. (Rec., pp. 109–117.)

The cases were heard in the Circuit Court before Judge Lacombe, who rendered an opinion on July 31, 1889, to the effect that the steamer was alone in fault by reason of her speed, and was solely responsible for the collision. (Rec., pp. 83–85.)

As to the *Willey*, the learned judge held, in his opinion, "that with all her sails set she is a good *10-knot vessel*, loaded, or *12*, *light*, in a nice set of ballast," and that *4 knots* for such a vessel, in a *5 or 6 knot breeze*, in a thick fog, was not an immoderate speed at the place where the collision occurred. (Rec., p. 85, fol. 144.)

The opinion of the Circuit Judge, as printed in the Record (page 83), is reported in *39 Fed. Rep.*, *505*.

The Circuit Court made and filed its findings of fact and conclusions of law, as follows:

Findings of Fact.

"1. The *Martello* is a British steamship of 2,439 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, owned by the respondents and appellants, Charles Henry Wilson and Arthur Wilson, and is one of the Wilson Line of steamers plying between New York and Hull and other foreign ports.

"2. The *Martello* left her dock in Jersey City on Saturday afternoon, May 7, 1887, laden with a miscellaneous cargo of merchandise, bound for Hull, England.

The weather was so foggy that she could not go down the channel, but anchored for the night in Gravesend Bay.

"3. The *Martello* got under way from Gravesend Bay about 6 a. m., Sunday, May 8, 1887, and started for sea in command of Captain Francis E. Jenkins, the senior captain of the New York service of the line, and in charge of pilot Joseph Henderson. The weather was thick, but sufficiently clear to enable the buoys marking the channel to be seen. She proceeded down the swash channel and thence through Gedney's channel to sea.

"4. When about half a mile to the westward of the perch and ball buoy, *i. e.*, about north from the black buoy No. 1, her engine was stopped for the purpose of slowing the vessel until the pilot could be discharged; that being done, the engines were, at 7.10 a. m., moved slow ahead.

"5. About 40 minutes after discharging the pilot, the horn, *one blast*, of a sailing vessel was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the cro'nest, about 100 feet abaft the stern, the first officer was on the lookout on the forecastle and the quartermaster was at the wheel.

"6. At that time the steamer was heading E. S. E., the wind was about E. by N., blowing a five to six knot breeze; the fog had grown denser and vessels could not be seen over a quarter of a mile away; the whistle of the steamer had been blown regularly at intervals of thirty seconds or less, and her speed was about 5½ to 6 knots an hour; three knots an hour would give her good steerage way.

"7. About a minute or two after hearing the horn, the officers of the *Martello* saw the barkentine *Freda A. Willey* looming in sight through the fog.

"8. On April 24, 1887, the barkentine *Freda A. Willey* left Pensacola, bound through Long Island Sound for New Haven, with a cargo of yellow pine lumber, and on Sunday, May 8, about 8 o'clock a. m., she was bound into the harbor of New York.

"9. The *Willey* with all her sails set can make ten knots an hour; with the wind as found in the sixth finding the *Willey*, if going at less than four knots an

hour, would not have steerage way sufficient to give her master thorough control of her to tack, wear, or manage her as occasion might require.

"10. About 4 a. m. of May 8 she was sailing with her main sail, spanker, main staysails, upper and lower fore-topsails, foretop-gallant sail, and three jibs; at 5 a. m. the wind freshened and she took in her royal; at 7 a. m., the wind freshening, her fore sail was hauled up.

"11. There was on the deck of the *Willey* before the collision, Cobb, able seaman; on the lookout, Mathlin, able seaman; at the wheel, Ludvinger, second mate, and Willey, captain, about her deck; the rest of the crew were below; she was heading north close-hauled on the starboard tack, sounding her horn at intervals of one or two minutes and making about four knots an hour.

"12. While thus proceeding she thrice heard the steamer-whistle of a steamer, answering promptly each time with a single blast of her horn; at this last signal the *Martello* appeared in sight, bearing about four points on the port bow and a quarter of a mile away.

"13. As soon as the *Willey* loomed in sight of those on the *Martello*, as indicated in the seventh finding, the first officer of the steamship called out hard-a-port, and the lookout reported a vessel on the starboard bow; the captain immediately ordered the helm hard-a-port and the engines reversed full speed.

"14. The speed of the *Martello* under a hard-a-port helm and with engines reversed at full speed became gradually reduced, and at the time of the collision was about two knots an hour.

"15. The place of collision was about 1¾ miles about N. by E. from Sandy Hook lightship.

"16. As the vessels neared each other the first officer of the *Martello* called out to the barkentine, "Luff, luff, all you can," but his call was not heard by those on the *Willey*.

"17. From the time of the hearing of the first whistle down to the time of the collision the steamer, except as stated in the 16th finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines. In consequence, the *Willey* held her course, as she was bound to do, but the steamer ran

into her with great violence, the steamer's stem running into the port bow of the barkentine, cutting its way into her keel, knocking her stem over to starboard and driving her bow round to eastward.

"18. Had the steamer been going at three knots an hour, had she stopped her engines as soon as she heard the *Willey's* horn, and reversed when she sighted the barkentine, she would have stopped out of the *Willey's* course.

"19. The master of the barkentine was on deck; he had his vessel under control. If when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer was starboarding her wheel he could have ported and avoided the collision. If at that time the steamer had ported her wheel the barkentine keeping her course would have crossed the steamer's bow in safety. If at that time the master of the barkentine had been advised that the steamer was reversing he could have ported and avoided the collision."

Conclusions of Law.

1. The *Freda A. Willey* was free from fault.

2. The *Martello* was in fault for proceeding at an excessive rate of speed in a fog, and is solely responsible for the collision.

3. There should be a decree for the *Freda A. Willey* and against the *Martello* in each case, with costs of the district and circuit courts.

The counsel for the *Martello* requested the Circuit Judge to make certain additional findings of fact and conclusions of law on behalf of the steamer and owners.

The learned Judge made certain of such findings of fact, as requested, and refused to find the remaining requested findings of fact. (Rec., p. 88, fol. 153; also p. 90, fol. 158.)

The additional findings of fact so made by the Circuit Judge, are as follows:

"16. Captain Jenkins has held a master's certificate since 1856. Pilot Henderson has been a New York and Sandy Hook pilot for nearly forty-two years.

"30. Article XIII of the International Rules and Regulations for Preventing Collisions at Sea is as follows: 'Every ship, whether sailing ship or steamship, 'shall, in a fog, mist, or falling snow, go at a moderate 'speed.'

"31. The moderate speed required by this article is not a fixed rate of knots per hour, but something materially less than the vessel's full speed.

"32. The *Willey* at four o'clock on the morning of the collision was some twenty miles to the southward of the Sandy Hook lightship.

"35. The *Willey* at the time of the collision was carrying not less than 2,191 square yards of canvas.

"44. The ordinary course of outward-bound European steamers after leaving Gedney's channel is about E. S. E., and therefore across the course pursued by the barkentine.

"48. Article XIX of the International Rules and Regulations for Preventing Collisions at Sea, is as follows: 'In taking any course authorized or required by these 'regulations, a steamship under way may indicate that 'course to any other ship which she has in sight by the 'following signals on her steam whistle, viz.: one short 'blast to mean I am directing my course to starboard; 'two short blasts to mean I am directing my course to 'port; three short blasts to mean I am going full speed 'astern. The use of these signals is optional, but if 'they are used the course of the ship must be in accord-'ance with the signal made.'

"51. It was the duty of the barkentine, under the circumstances, and with danger imminent, to use all the means reasonably within her power to avert the collision.

"56. The crew of the barkentine consists of a captain, mate, second mate, five men before the mast, and the steward; nine in all."

The counsel for the *Martello* also requested the Circuit Judge to make the following additional finding of fact and conclusion of law, viz.:

"The following additional findings of fact and conclusions of law are hereby requested on behalf of the owners of the *Martello*.

"104. *The horn of the Willey on board of her, and sounded at the time of the collision, was not a horn sounded or to be sounded by mechanical means, but was a tin fog-horn.*

"CONCLUSION OF LAW.

"*5. The Willey was in fault for not having and using a horn sounded by mechanical means, as required by Article 12 of the International Rules for Preventing Collisions at Sea.*" (Record, p. 90, fols. 158, 159.)

The learned Circuit Judge thereafter filed the last-mentioned additional requests to find, *having found the said finding of fact, as requested, and having refused to find the said conclusion of law, as requested.* (Rec., p. 90, fol. 159.)

The counsel for the *Martello* thereafter, and before the entry of any judgment or decree in said causes, or either of them, and the allowance of the bill of exceptions herein, and within the time allowed for that purpose by the rules and practice of said Circuit Court of the United States for the Southern District of New York, filed in the office of the clerk of said Court and served upon the proctors for the barkentine and her owners with notice of filing exceptions separately to the findings of fact and conclusions of law made and filed by the learned Circuit Judge, as being unsustained by any proper legal evidence, and being in opposition to the facts proved by the testimony presented and as contrary to law, and also separately to the failure and refusal of the said judge to make the findings of fact and conclusions of law submitted and proposed to him on behalf of the owners of said steamship, and which said judge was requested to make as supported by competent and relevant testimony. (Rec., p. 90, fol. 159.)

Among the original findings of fact and conclusions of law made by the Circuit Judge, to which the appellants duly excepted, are the following:

Findings of Fact.

"7. About a minute or two after hearing the horn "the officers of the *Martello* saw the barkentine *Freda* "*A. Willey* looming in sight through the fog.

"9. The *Willey* with all her sails set can make ten "knots an hour; with the wind as found in the sixth "finding the *Willey*, if going at less than four knots an "hour, would not have steerage way sufficient to give "her master thorough control of her to tack, wear or "manage her as occasion might require.

"17. From the time of the hearing of the first whistle "down to the time of the collision the steamer, except "as stated in the 16th finding, gave no signal or indica-"tion showing whether her intention was to go ahead "of the barkentine or astern, or even whether she had "reversed her engines. In consequence the *Willey* held "her course, as she was bound to do, but the steamer "ran into her with great violence, the steamer's stern "running into the port bow of the barkentine, cutting "its way into her keel, knocking her stern over to star-"board and driving her bow round to eastward.

"18. Had the steamer been going at three knots an "hour, had she stopped her engines as soon as she heard "the *Willey's* horn, and reversed when she sighted the "barkentine, she would have stopped out of the *Willey's* "course.

"19. The master of the barkentine was on deck; he "had his vessel under control. If, when the steamer "first sighted the barkentine, the master of the latter "had been advised that the steamer was starboarding "her wheel, he could have ported and avoided the col-"lision. If at that time the steamer had ported her "wheel, the barkentine keeping her course would have "crossed the steamer's bow in safety. If at that time "the master of the barkentine had been advised that "the steamer was reversing he could have ported and "avoided the collision."

"CONCLUSIONS OF LAW.

"1. The *Freda A. Willey* was free from fault.

"2. The *Martello* was in fault for proceeding at an "excessive rate of speed in a fog, and is solely respon- "sible for the collision." (Rec., pp. 81–83; also Rec., pp. 92–93.)

Among the original and additional findings of fact and conclusions of law which the Circuit Judge was requested to make on behalf of the *Martello*, and which he failed and refused to make, and to which failure and refusal the appellants duly excepted, are the following:

"FINDINGS OF FACT.

"26. The *Martello*, at the instant of sighting the "barkentine, was proceeding slowly ahead, the engines "working at about 24 revolutions per minute.

"27. The lowest speed at which the engines could "be worked to give the *Martello* good steerage way "was 24 revolutions per minute. (*Rec., p. 85, fol. 146.*)

"53. If the master of the *Willey* on seeing the dan- "ger had luffed immediately the collision would have "been averted.

"60. The master of the barkentine instead of taking "measures to avoid the collision waited for the steamer "to give the optional signals under Rule XIX.

"71. The barkentine contributed to the collision by "proceeding in a thick fog across the line of outward- "bound European steamers at an immoderate rate of "speed; by neglecting to properly blow her horn, and "by waiting for the optional signals under Rule XIX "instead of taking measures at once to arrest the col- "lision.

"72. After discharging the pilot the steamer pro- "ceeded on at about 28 revolutions of the propeller per "minute.

"74. At about 7.20 the captain of the *Martello* di- "rected the third officer, orally, to go down to the third "engineer and tell him to go as slow as he could.

"75. The third mate went down to the engine room

"and delivered the message from the captain, to go as "slow as possible, to the engineer.

"76. The engineer received the message through the "third engineer and thereupon reduced the engines to "24 revolutions per minute.

"77. The engines were continued at 24 revolutions "per minute until they were reversed at full speed at "about the time, or shortly before, the barkentine was "sighted." (*Rec., p. 88, fol. 153.*)

"CONCLUSIONS OF LAW."

"1. The *Martello* was free from fault."

"2. The *Freda A. Willey* was in fault, and the col- "lision was occasioned by her negligence and improper "navigation and her neglect of proper precautions, and "her failure to take any measures to avoid the threat- "ened collision." (*Rec., p. 80, fol. 135.*)

"5. The *Willey* was in fault for not having and using "a horn sounded by mechanical means, as required by "Article 12 of the international rules for preventing "collisions at sea." (*Rec., p. 90, fol. 159.*)

It is proper to call the attention of the court to the language used by the learned Circuit Judge in refusing to make the additional findings of fact requested on behalf of the steamer:

"The additional findings of fact requested (on behalf "of the *Martello* and owners) must be refused. As to "some of them the propositions are material, but have "already been found the other way; as to the others "the propositions are not material to the determination "of the cause, *although many of them are sustained by* "*uncontradicted evidence.* Most of them, moreover, "are in reality not requests to find the facts of the case, "but requests to find the evidence."

(Record, p. 90, fol. 158.)

Decrees were entered in accordance with the findings and opinion of the Circuit Judge on July 16, 1890. The

decree on the original libel reversed the decree of the District Court and adjudged that the libellant, Ichabod Willey, recover of the steamship *Martello*, her engines, etc., the amount of his damages with interest and costs in both the District and Circuit Courts, amounting in all, at the date of the decree, to $22,943.43. The decree on the cross-libel reversed the decree of the District Court, and dismissed the cross-libel with costs of both the District and Circuit Courts, amounting to $184.25. (Rec., pp. 123–125.)

From these decrees appeals were duly taken by Charles Henry Wilson and Arthur Wilson, the owners of the *Martello*, to this court. (Rec., pp. 125–127.)

Specification of Errors.

The Court below erred as follows :

I. In deciding that the *Freda A. Willey* was free from fault. (Rec., p. 83.)

II. In deciding that the *Martello* was in fault for proceeding at an excessive rate of speed in a fog, and was solely responsible for the collision. (*Ibid.*)

III. In not deciding that the *Freda A. Willey* was in fault, and was solely responsible for the collision.

IV. In deciding that there should be a decree for the *Freda A. Willey*, and rendering and entering a decree for her, against the *Martello*, in each cause, with costs of the District and Circuit Courts. (Rec., 123, 124.)

V. In not deciding that there should be a decree for the *Martello*, and in not rendering and entering a decree for her, against the *Freda A. Willey*, in each cause, with costs in the District and Circuit Courts.

VI. In not deciding that the *Freda A. Willey* was in fault for not having and using a horn sounded by mechanical means, as required by Article 12 of the International Rules for Preventing Collisions at Sea. (Rec., p. 90.)

VII. In not deciding that the speed of the *Freda A.*

Willey was immoderate and excessive, in the fog, and that the collision was occasioned by her negligence and improper navigation and her neglect of proper precautions, and her failure to take any measures to avoid the threatened collision.

VIII. In not deciding that the standard of good steerage way, for the *Freda A. Willey*, was less than four knots an hour, before the collision.

IX. In refusing to find, as requested on behalf of the *Martello*, that if the master of the barkentine, on seeing the danger, had luffed immediately, the collision would have been averted. (Record, p. 87.)

X. In refusing to find, as requested on behalf of the *Martello*, that "the master of the barkentine, instead of taking measures to avoid the collision, waited for the steamer to give the optional signals, under Rule XIX." (Rec., p. 87)

XI. In finding that the speed of the *Martello* before the collision was about 5½ to 6 knots an hour. (Rec., p 81.)

XII. In finding that "about a minute or two after hearing the horn the officers of the *Martello* saw the barkentine *Freda A. Willey* looming in sight through the fog," while also finding that "at this last signal the *Martello* appeared in sight." (Rec., pp. 81, 82.)

XIII. In finding that "had the steamer been going "at three knots an hour, had she stopped her engines "as soon as she heard the *Willey's* horn and reversed "when she sighted the barkentine, she would have "stopped out of the *Willey's* course." (Rec., p. 82, fol. 139.)

XIV. In refusing to find as requested, on behalf of the *Martello*, as follows:

(1) That the lowest speed at which the engines could be worked to give the steamer good steerage way was 24 revolutions per minute.

(2) That after discharging the pilot the steamer proceeded on at about twenty-eight revolutions of the propeller per minute.

(3) That at about 7.20 the captain of the *Martello* directed the third officer, orally, to go down to the third engineer, and tell him to go as slow as he could.

(4) That the third mate went down to the engine-

room and delivered the message from the captain to go as slow as possible to the engineer.

(5) That the engineer received the message through the third officer, and thereupon reduced the engines to 24 revolutions per minute.

(6) That the engines were continued at 24 revolutions per minute until they were reversed at full speed, at about the time, or shortly before, the barkentine was sighted. (Record, pp. 85, 88.)

ARGUMENT FOR THE APPELLANTS.

I.

The Barkentine, Freda A. Willey, was clearly in fault and solely responsible for the collision by reason of her failure and neglect to have and use an efficient fog-horn to be sounded by a bellows or other mechanical means, and the Circuit Court should have so adjudged.

1. The first conclusion of the law of the learned Circuit Judge from the facts originally found by him, is, that the *Willey* was free from fault.

He subsequently found as matter of fact, as follows:

"The horn of the *Willey* on board of her, and sounded at the time of the collision, was not a horn sounded or to be sounded by mechanical means, but was a tin fog-horn."

The learned judge was asked to find, but refused to find, as a conclusion of law, that "the *Willey* was in fault for not having and using a horn sounded by mechanical means, as required by Article 12 of the International Rules for Preventing Collisions at Sea."

The appellants excepted to this refusal. (Rec., p. 90, fol. 159.)

It should have been decided by the Court below, as matter of law, that the *Willey* was in fault in failing to

comply with the rules prescribed in Article 12 of the "*Revised International Rules and Regulations for preventing collisions at sea*," adopted and enacted by the Act of Congress of March 3, 1885, chap. 354, in respect to "*Sound Signals for Fog, and so forth.*"

Article 12 of the rules referred to provides as follows:

"A steamship *shall be provided* with a steam whistle or other efficient steam sound signals, so placed that the sound may not be intercepted by any obstructions, *and with an efficient fog-horn, to be sounded by a bellows or other mechanical means*, and also with an efficient bell. (In all cases where the regulations require a bell to be used, a drum will be substituted on board Turkish vessels.) *A sailing ship shall be provided with a similar fog-horn and bell.*

"In fog, mist, or falling snow, whether by day or night, the signals described in this Article *shall be used* as follows, that is to say:

"(*a*) A steamship under way *shall* make with her steam whistle or other steam sound signal at intervals of not more than two minutes, a prolonged blast.

"(*b*) *A sailing ship under way shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.*

"(*c*) A steamship and a sailing ship when not under way *shall*, at intervals of not more than two minutes, ring the bell."

23 Stats. at Large, 440.

The rule which thus required the barkentine, in May, 1887, to have, and use when under way, in a fog, a mechanical fog-horn, as described in the statute, is, by its terms and intention, imperative; and there can be no doubt upon principles well settled in this court that the failure of the vessel to comply with that regulation was a fault, which must be deemed to have been

at least a contributory cause, if not the sole cause, of the collision.

The *Dexter*, 23 Wall, 69;
The *Pennsylvania*, 19 Wall, 125;
Richelieu Nav. Co. *v.* Boston Ins. Co., 136 U. S., 422;
Belden *v.* Chase, 150 U. S., 698, 699.

The Court, speaking by the Chief Justice, in the recent case of *Belden* v. *Chase*, said:

"It is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

This principle has been specifically applied by the English Admiralty Court, and by the United States Circuit Court of Appeals for the Second Circuit, and several District Courts of the United States, in cases of violation of the regulation requiring a sailing vessel to be provided with and to use, during fog, an efficient fog-horn to be sounded by a bellows or other mechanical means.

The leading case on the subject in Great Britain is that of *The Love Bird*. (L. R., 6 Prob. Div., 80.)

Sir Robert Phillimore, in that case, said:

"But it remains to consider whether the sailing vessel is not also to blame. Now the Regulations for Preventing Collisions at Sea, which contain the regulations applicable to this case, came into operation on the first of September last, and the 12th Article of these regulations is to this effect: '*A steamship shall be provided with a steam whistle or other efficient sound signal, and an efficient fog-horn to be sounded by a bellows or other mechanical means, and a sailing ship shall be provided with a similar fog-horn or (and) bell.*' There is no dispute that the sailing vessel in this case was not provided with a fog-horn

"to be sounded by mechanical means. The evidence is "that she left Dieppe about the 20th of August, 1880, "when the Regulations for Preventing Collisions at "Sea had not yet come into operation, but that those "on board her were perfectly aware that they would "come into operation after she left Dieppe. It also ap- "pears that there was a copy of the regulations on "board her the last day she was at Dieppe.

"The defense raised in her behalf is that the regula- "tions did not come into force until after she had sailed "from Dieppe, but there is no evidence to show that a "mechanical fog-horn could not have been got at "Dieppe before she sailed, and in the judgment of the "court the fact of a vessel not having on board an effi- "cient fog-horn to be sounded by mechanical means "would be no excuse when those on board the vessel "unprovided with such fog-horn knew, as was the case "here, that the regulations would come into force whilst "the vessel was at sea.

"I am, therefore, very sorry to say that though the "decision I have come to operates severely upon the "sailing vessel, I can not decide that the present case is "one that can be excluded from the operation of the "17th section of the Merchant Shipping Act, on the "ground that the circumstances of the case made a de- "parture from the 12th Regulation necessary. The "section I have referred to enacts as follows: 'If in "'any case of collision it is proved to the court before "'which the case is tried that any of the regulations for "'preventing collisions at sea, contained in or made "'under the Merchant Shipping Acts, has been in- "'fringed, the ship by which such regulation has been "'infringed shall be deemed to be in fault, unless it is "'shown to the satifaction of the court that the circum- "'stances of the case made departure from the regula- "tion necessary.' There are several judicial decisions "on the construction of this section, and they have de- "cided that if by any possibility a noncompliance with "the regulations referred to could have contributed to "the collision, the ship by which the regulations have "been infringed is to blame for the collision.

"I think that in this case the sailing vessel must be "deemed in fault under the section. I am sorry I can

"not come to the conclusion, nor can the Elder Brethren "of the Trinity House, come to the conclusion that by "no possibility could the sounding of a mechanical "fog-horn, according to the thirteenth article of the reg- "ulations, have prevented the collision, or that it would "not possibly have given more warning to the other "vessel.

"Therefore, I am bound to say that the steamer is to "blame, and that the other vessel is equally in fault. "There will be no costs on either side."

The leading case in this country is the recent case of *The Bolivia* (49 F. R., 169, 170), in the United States Circuit Court of Appeals for the Second Circuit, in which the opinion of the Court was delivered by Judge Wallace, who said :

"The schooner was plainly in fault for not comply- "ing with the statute which since 1885 has required "sailing vessels to be provided with an efficient fog- "horn to be sounded by mechanical means. (Act "March 3, 1885, 23 St., p. 438, ch. 354, art. 12.) By "presumption of law, as she was at the time of the col- "lision in violation of a statutory rule intended to pre- "vent collision, her fault was at least a contributory "cause of the disaster. Under the circumstances of the "present case it seems more than probable that if she had "been provided with and had properly used such a fog- "horn as the statute prescribes, the steamship would "have been notified of her proximity, and could have "reduced her speed to the lowest rate consistent with "her ability to control herself efficiently in a moment "of peril."

* * * * * *

"We regret to have to apply the strict rule of the "authorities, in respect to moderate speed in a fog, "against the steamship in favor of a vessel that ne- "glected to provide herself with any adequate means to "enable the steamship to discover and avoid her, or for "her own protection or that of other vessels in a fog ; "but we must conform to the law as it has been en- "acted and construed. The case is one for a division "of the loss."

Judge Lacombe, who decided the case at bar before the organization of the Circuit Court of Appeals, sat in the case of *The Bolivia*, and participated in the decision of that case.

The rule has also been enforced in several cases in the District Courts of the United States.

The Trave (55 Fed. Rep., 117, 119), Judge Brown said:

"The ship, however, must also be held in fault for "not complying with Art. 12 of the new international "regulations which required that she should be pro- "vided with an efficient fog-horn to be sounded by a "bellows or other mechanical means. The ship on "leaving Havre had such a horn, provided with a pis- "ton for blowing it by mechanical means, but there "was considerable fog on the voyage, and a few days "before this collision the apparatus had got out of or- "der by the derangement of some valve, and a horn "blown by the mouth was thereafter used instead.

"The object of the new rule, which is as obligatory "on sailing vessels as on steamers, (the *Wyanoke*, 40 "Fed. Rep., 702; the *Catalonia*, 43 Fed. Rep., 396; "the *Bolivia*, 49 Fed. Rep., 169, 1 C. C. A., 221), is "manifestly for the purpose of securing louder and "more penetrating blasts than can be given by the "mouth, in order that the presence of vessels in a fog "may be made known at a greater distance and a better "opportunity thereby be given to avoid collision. If "therefore there is any obligation at all upon a ship to "make provision for the possible giving out of a single "fog-horn on the voyage this obligation is not satisfied "by supplying a spare horn substantially different from "what the statute requires. I cannot doubt that the "obligations of reasonable prudence do require in a "matter so essential to safe navigation upon the Atlan- "tic as a fog-horn for use during fog, that a spare horn "should be provided to meet the liability to loss or de- "rangement that may happen from various causes dur- "ing the voyage. A ship that started across the Atlan- "tic with no spare compass, chain, or tackle would "surely not be deemed reasonably equipped for the

"voyage, and she could not plead her lack of equipment "in any of those respects as an excuse for non-compli- "ance with the rules of navigation. It is the same "with so important an article as a fog-horn, and no sub- "stitute can be lawfully supplied substantially different "from what the statute requires. I cannot follow *The* "*Chilian*, 4 Asp., 473.

"It is impossible to say that the lack of a mechanical "fog-horn in this case would have made no difference. "On the contrary, there is every probability that it "might have made a difference sufficient to have avoided "collision, for the last blast given happened to come "after the sails of the ship had been seen. At the pre- "vious blast given, probably a minute before, the steamer "was too far away to hear it; whereas the blast of a "mechanical fog-horn given at the same time might "very probably have been heard, and the slowing of the "steamer, which would naturally thereupon have been "ordered a minute earlier, would certainly have avoided "this collision. It is not incumbent on the steamer, "however, to show that the use of a mechanical fog- "horn would have certainly prevented collision. The "burden, upon non-compliance upon the statute, is "upon the faulty ship. She *remains* in fault unless she "can prove certainly that a compliance with the statute "could not possibly have made any difference, and this "as in the case of *The Pennsylvania*, 19 Wall., 125, 137, "138, is impossible. *The Bolivia*, *supra*."

Judge Brown also held the schooner in fault in case of *The Wyanoke* (40 Fed. Rep., 702), "for having no "mechanical means for sounding her horn," and divided the damages, holding the steamer also in fault for excessive speed and for other reasons.

In the case of *The Catalonia* (43 Fed. Rep., 396), Judge Nelson, sitting in the District Court of Massachusetts, enforced the same principle. He says (p. 397):

"*Article 12* of the sailing regulations provides that a "steamship besides her steam whistle shall be provided "with an efficient fog-horn, to be sounded by a bellows "or other mechanical means, and that a sailing ship

"shall be provided with a similar fog-horn, and that a "sailing ship under way shall make with her fog-horn "at intervals of not more than two minutes when on "the starboard tack, one blast; when on the port tack, "two blasts in succession; and when with the wind "abaft the beam, three blasts in succession. The fog- "horn on the schooner was a common horn sounded by "the breath. She did not have on board and therefore "did not blow a fog horn sounded by a bellows or other "mechanical means. The argument of the learned "proctor for the schooner failed to convince me that "the human lungs are an equivalent for the bellows. "I have already decided in two cases before this that "neglecting to sound a regulation fog-horn in a fog "was a fault on the part of a sailing ship unless it is "shown with certainty that the omission could not have "caused the collision.' I quote as applicable to the "present case the apt language of Judge Lowell in a "case arising under the old rules where a sailing ship "omitted to use a torch:

"'*Congress has refused to relieve steamships of the "burden of avoiding sailing ships, however difficult it "may be for large steamers to be handled readily, and "however easy for some light sailing craft; but they "have imposed upon the latter the duty of giving notice "of their presence by certain definite means.* We are "bound, therefore, to believe that the exhibition of a "torch is useful under ordinary circumstances. Ex- "perts may, perhaps, be found to testify that a moder- "ate speed is harmful, a fog-horn useless, and a torch "actually misleading, but the statute must be obeyed. "(*The Hercules*, 17 Fed. Rep., 606.'

"*In this case the schooner's fog-horn was not heard on "the steamer until the very moment she came in sight. "A regulation fog-horn which must be supposed to give "a louder blast, might, and probably would have been "heard sooner, and the accident have been prevented.*"

And again, in the case of *The Energy* (42 Fed. Rep., 301, 303), Judge Nelson held both vessels, sailing ves- sels, in fault for not having a mechanical fog-horn:

"Both vessels were without an efficient fog-horn, "sounded by a bellows or other mechanical means, as "required by the international sailing regulations. I "decided in the recent case of the *Catalonia* (*supra*), "and also in two other cases, that neglecting to have on "board the regulation fog-horn was a fault in a sailing "ship in a collision in a fog unless it was shown with "certainty that the omision could not have contributed "to cause the collision. No such proof is furnished "here. Both vessels sounded a common fog-horn "blown by the breath, but the fog-horn of the *Energy* "was not heard at all on the *Monmouth*, and that of the "*Monmouth* was not heard on the *Energy* until just the "moment the *Monmouth* came in sight. It was plainly "the duty of the *Monmouth*, having the right of way, "to give notice of her presence to vessels approaching "from the southward by the means prescribed by the "sailing rules. It was argued for the *Energy* that as "she was bound to keep out of the way of the *Mon-* "*mouth* and the latter had only to keep her course, "she should be excused for the omision. But I am "bound to conclude that a regulation horn can be "heard further off than a common horn, and that if the "lookout on the *Monmouth* had been sooner made aware "of the approach of the *Energy* he would not in his "fright and confusion have luffed across her bows. The "*Energy* is condemned * * * for not carrying the "regulation fog-horn. The *Monmouth* was in fault * "* * for being without the regulation fog-horn."

2. It is unnecessary to comment upon these decisions, or enlarge upon the principle involved in them. The doctrine they declare is strictly in conformity to the previous decisions of this Court upon kindred questions.

In the case of *The Pennsylvania* (19 Wall., 125, 137, 138) this Court expressly adjudged that the Act of April 29, 1864, which required sailing ships under way to use a fog-horn, precluded an inquiry whether, in fact, a bell gave notice to a steamer that a bark was where she was as soon as a fog-horn would have done.

Mr. Justice Strong, speaking for the Court, in that case, said :

"Who can say that the proximity of the vessels would not have been discovered sooner if the bark had obeyed the navy regulations. * * * The truth is the case is one in which, while the presumption is that the failure to blow a fog-horn was a contributory cause of the collision, and while the burden of showing that it was in no degree occasioned by that failure, rests upon the bark, *it is impossible to rebut the presumption.* It is a well-known fact that in some states of the atmosphere a fog-horn can be heard at much greater distance than in others. How far it could have been heard when this collision occurred can never be known. Nor can it be known what precautions the steamer would have adopted if the *true and proper signal* had been given her."

The language of the eminent Judge who delivered this opinion is entirely pertinent to this case, and the effect of the provision of the Act of 1885 in regard to the use of a mechanical fog-horn by a sailing vessel under way in a fog, which was disregarded by the *Freda A. Willey* on this occasion.

The proofs and findings in this case show that while the *Willey* was able to hear, and did hear, the steamer's whistle *three times* before she saw the steamer, the *Martello* did not hear the tin fog-horn of the barkentine until immediately before the latter came in sight.

The finding is, that the barkentine answered the steamer's whistle each time with a single blast of her horn, but the answer was no answer, because it was not heard by anybody on board of the *Martello;* and the finding is that "*at* this last signal the *Martello* appeared in sight."

If the steamer had heard the previous signals of the fog-horn, she would have stopped, or taken some other precaution to avoid a possible collision, as we are bound to believe.

There can be no moral doubt that if the *Willey* had used a mechanical fog-horn on this occasion the steamer would have heard her answering signals to her whistles, and the collision would never have happened.

The case itself is the best evidence and illustration that could be afforded of the policy and wisdom of the statute requiring vessels to have and use when under way in a fog, a fog-horn sounded by mechanical means.

The Act of August 19, 1890, c. 802 (26 Stats., 325), entitled "An Act to adopt regulations for preventing collisions at sea," contains similar provisions in respect to the use of mechanical fog-horns. The Act is divided into Articles, and is more comprehensive than the Act of 1885.

II.

The Barkentine was in Fault for Proceeding at an Immoderate Rate of Speed in a Fog, and for Neglecting to take any Measures to avoid the Collision.

A. *The Barkentine was in Fault by Reason of her Speed.*

1. The Circuit Court found (11th finding of fact) that the barkentine, previously to the collision, was making about four knots per hour; that she was heading north, close-hauled, on the starboard tack (fol. 136), and in the sixth finding of fact, that the wind was about E. by N., and blowing a five to six knot breeze. (Fol. 137.)

The learned and experienced District Judge held this to be immoderate speed in a fog. He says:

"In the present case the circumstances above referred "to required special caution on the part of the sailing "vessel as well as of the steamer. The speed which "would have been moderate and justifiable further out "at sea was imprudent in a thick fog just outside of "New York harbor, at a time and place where many

"other sailing vessels were to be expected to be ap-
"proaching, and steamers to be departing upon courses
"crossing the *Willey's* at nearly right angles. The
"*Willey* had about three-fourths of all her canvas
"set. *She had by no means brought her speed 'down*
"*'to the standard of good steerage way; on the con-*
"*'trary, she was going at nearly full speed.'* She
"hauled up her foresail a while before, not to diminish
"her speed, but to avoid increasing it, as the breeze
"was freshening. Four knots for her was equivalent
"to eight knots for the steamer, relatively to her maxi-
"mum speed, as well as to her ability to keep out of
"the way of other vessels that she might be bound to
"avoid.

"Two such sail vessels crossing at her speed in such
"a fog would be likely to come into collision in spite of
"anything that either or both could do after they had
"sighted each other. Such navigation was not prudent
"or reasonable, and therefore not moderate in a situa-
"tion where many other ships, sail vessels, as well as
"steamers, were likely to be met, some of which it
"might be her duty to avoid. She was bound in such
"a place to moderate her speed within the limits of fair
"steerage way, so that she could do her share in avoid-
"ing collision after the danger of it was perceived. As
"observed in the case of *The Rhode Island* (17 Fed. Rep.,
"554, 559), if the speed of the sailing vessel would not
"be prudent or justifiable or moderate, as respects other
"sailing vessels that she was likely to meet and out of
"whose way she would be bound to keep, the same rule
"must be applied and her speed be held not moderate,
"though the other vessel be a steamer. Though she
"may have the right of way she has no right to increase
"the burden that falls on the steamer to keep out of the
"way." (Record, fol. 222.)

The opinion of the learned Circuit Judge as to the speed of the *Willey* states (fol. 144):

"The District Court held that the *Willey* had by no
"means brought herself down to the standard of *good*
"*steerage way;* on the contrary, she was going at nearly
"full speed. *In support of this proposition there was no*

"*direct testimony below*, and the uncontradicted proof "in this court shows that with all sails set she is a good "12-knot vessel, loaded, or 10 light, in a nice set of "ballast, and that at less than four knots she would not "have steerage way *sufficient to give her master perfect "control of her to tack, wear, and handle her as occasion "might require.*"

The finding of the Circuit Judge is in similar language, and is as follows:

"9. The *Willey* with all her sails set can make ten "knots an hour; with the wind as proved in the sixth "finding, the *Willey*, if going at less than four knots an "hour, would not have steerage way sufficient to give "her master thorough control of her to tack, wear or "manage her as occasion might require." (Rec., p. 81, fol. 137.)

It is to be observed in respect of this finding that it does not state, in terms, that the speed of the vessel had been reduced, as it ought to have been reduced, "*down to the standard of good steerage way*," or that her speed was moderate. The finding merely is that four knots an hour gave her steerage way sufficient to give her master thorough control of her to tack, wear or manage her as occasion might require. This is by no means a finding that her speed had been brought down to the standard of good steerage way. Good steerage way, under the circumstances, was such speed as would enable her merely to keep her course. If the finding does not avoid determining the fact as to steerage way, it shows, in effect, that the vessel had *more* than good steerage way at the time of the collision. Any other rate of speed than good steerage way, at that time, under the settled law of the admiralty, was immoderate, excessive, and imprudent, and put the barkentine in fault in respect to the collision.

If the finding of the Court does not state, in terms,

that the speed was only sufficient to give good steerage way, within the meaning of the admiralty rule, the finding does not show, as a matter of law, that the speed was moderate. If the finding does not show this fact, the conclusion of the Circuit Judge that the *Willey* was *not* in fault, is erroneous, and the decree must be reversed.

But, further, the record shows that the only evidence to sustain the finding, whatever may be its meaning, was that of the libellant himself, entirely uncorroborated. (Rec., p. 23, fol. 38 *et seq.*)

The fact which the finding was intended to cover was a vital one. Upon it depended largely whether the barkentine was in fault for the collision or not. The learned District Judge, *who saw the witness*, held that the speed of the barkentine had not been "brought down to the standard of good steerage way." The libellant was a party to the cause and interested in the event of it. His testimony if correct could have been corroborated at least by the mate, who must have had ability to navigate the vessel during the absence of the captain for any reason, or by any of the men on the vessel who were accustomed to duty at the wheel.

There would seem to be no essential difference between a finding unsupported by any evidence, and a finding unsupported by any proper legal evidence, and that the latter is no more binding upon this court than the former.

If, however, this court is bound by the finding, the character of the evidence upon which it is based should at the least be ground for a rigid scrutiny of the language used, and unless such language is clearly and in terms a finding that the barkentine had brought her speed down to the limits of good steerage way, the finding and the conclusion of law based thereon should be disregarded.

2. It is maintained, however, on the part of the appellants, that the findings of the Circuit Court show that the barkentine was, in fact, sailing at an *immoderate rate of speed.*

The learned Circuit Judge evidently failed, as his opinion shows, to consider the effect that a *five to six knot breeze would have on the Willey*, and to consider that, being a sailing vessel and not a steamer, the barkentine's speed was entirely limited by the *force of the wind*, and that *as the wind was blowing a five to six knot breeze, the speed of four knots an hour was nearly the best speed she could make under the circumstances.*

The learned Circuit Judge evidently considered the testimony of the libellant, *Willey*, that the barkentine was a good 10-knot vessel loaded, or 12 light, in a nice set of ballast as having reference to her full speed, and that as she was not proceeding at 10 or 12 knots, but was making 4 knots, she had complied sufficiently with the rule as to proper navigation.

But this view is manifestly erroneous and can not be accepted. *The barkentine was proceeding at almost full speed with the wind as it was.* She was carrying at the time of the collision, as found by the Circuit Judge, not less than 2,191 square yards of canvas (Rec., p. 86, fol. 147.) Her entire canvas is not found, but it will not, we think, be disputed that it was 3,182 square yards. The opinion of the District Judge shows that any canvas that was taken off was not taken off to reduce the speed of the barkentine, but to avoid increasing the speed.

The District Judge undoubtedly referred to the following testimony, for the barkentine :

"Q. Why did you take off your fore-royal at 5 o'clock "a. m., on the morning of the 8th? A. Because the "wind began to freshen and I had more speed than I "needed.

"Q. Why did you haul the foresail up at 7 a. m.?
"A. Because it freshened more and I had more speed
"than I needed with it on." (Rec., p. 25, fol. 41.)

The opinion of the District Judge that the barkentine had not brought herself down to the limits of good steerage way is supported by the findings of the Circuit Judge as to the force of the wind, the canvas carried by her, and the speed she was proceeding.

The obligation rested upon her just as much as on the steamer to proceed at a moderate speed, and whether she had brought herself within the rule must be determined *upon the circumstances at the time of the collision*, and not by what she could do under *different* circumstances.

The authorities upon this subject are these :

The Zadok (L. R., 9 Prob. Div., 17):

"Now, at present there is a degree of uncertainty as
"to what construction is to be put upon the phrase
"that steamers and sailing vessels are to 'go at a mod-
"'erate speed' in a fog, and I am disposed to think
"that no absolute rate of speed can be fixed upon.
"But it appears to me that the object of the rule is
"this, that when a fog comes on it is the duty of the
"ship, whether she be a sailing vessel or a steamer, to
"moderate her speed as much as she can, yet leaving
"herself with the capacity of being properly steered.
"Of course, in the case of a sailing vessel, we know
"that she must have way in to fill her sails, otherwise
"she will not have the power of controlling her move-
"ments, but subject to that in a fog, where she can
"not see her way, it is her duty to moderate her speed
"down to this standard.
"Some margin must be allowed for the particular
"circumstances of the case, and it is not to be said that
"exactly the same rule would apply to a sailing vessel
"out in mid ocean, but *when one has to deal with a case*
"*like this, of a vessel which is passing across a course in*
"*which it is to be expected that numerous vessels may be,*

"*it is her duty to reduce her speed, as I have said, to as* "*low a rate as is consistent with her keeping a good* "*steerage way.*

"In this case it is proved that the *Zadok*, if she had "not, literally, every stitch of canvas set, yet had "very nearly all the canvas she could carry, and I "come to the conclusion, therefore, that she was going "at a speed which, in the circumstances, was not mod- "erate, and therefore, that she has infringed the rule."

The Beta, L. R. 9, Prob. Div., 134.

Brett, M. R., said:

"The greater part of this case depends on a question of law. By Article 13 the steamer was bound to go as slow as she could in a dense fog, such as existed at the time of this collision, and this she did. Then we come to the case of the *Beta*, the sailing vessel. Article 13 uses the words 'moderate speed,' and the interpretation of these words must depend on the density of the fog for a speed which may be moderate in a fog through which daylight appears is not a proper speed in a dense fog in which nothing can be discovered. Now, in the present case, speed other than would allow this sailing vessel to keep her steerage way was not moderate. In fact the *Beta* had all plain sail set, and then the question, arises was this more than enough to keep her under reasonable control. Our assessors think that it was. Then the inference which I draw from this is that she was going faster than was necessary to keep her under command, and therefore that she has infringed Article 13, and must be held to blame."

Bowen, L. J.:

"*The term 'moderate' is a relative term; it depends on place, on the kind of ship, and on the kind of fog. In a dense fog in the Bristol channel it is clear that a vessel must not go faster than will enable her to be kept under command.*"

The two general propositions of the appellants, therefore, in reference to the speed of the barkentine, are—

1. That the findings of the Circuit Court do not show that the vessel was proceeding at a moderate speed, or that she had brought her speed down to the standard of good steerage way.

2. That the findings show that the speed of the barkentine before the impending collision, was immoderate and imprudent.

B. *The barkentine was also in fault by reason of her failure to take any measures to prevent a collision after hearing the steamer's whistle, or after sighting the steamer, and when a collision was imminent.*

1. The Circuit Judge found as a fact :

"17. From the time of the hearing of the first whistle "down to the time of the collision the steamer, except "as stated in the 16th finding, gave no signal or indica- "tion showing whether her intention was to go ahead "of the barkentine or astern, or even whether she had "reversed her engines. *In consequence the Willey held "her course, as she was bound to do*, but the steamer ran "into her with great violence, the steamer's stem run- "ning into the port bow of the barkentine, cutting its "way into her keel, knocking her stem over to star- "board, and driving her bow around to eastward. (Rec., "p. 82, fol. 139.)

The appellants duly excepted to the portion of the finding which is italicized, among others. (17th exception, Rec., p. 93, fol. 163.)

The finding that the *Willey* was bound to hold her course is a conclusion of law, and is not binding upon this Court.

The E. A. Packer (140 U. S., 360, 364).

The finding was evidently based upon the fact that the steamer did not give the optional signals under Rule 19 :

"ART. 19. In taking any course authorized or required by these regulations, a steamship under way "*may* indicate that course to any other ship which she "has in sight by the following signals on her steam "whistle, namely:

"One short blast, to mean 'I am directing my course "'to starboard.' Two short blasts, to mean 'I am di-"'recting my course to port.' Three short blasts, to "mean 'I am going full speed astern.' *The use of these* "*signals is optional*, but if they are used the course of "the ship must be in accordance with the signal made." (23 U. S. Stat., p. 441.)

The use of the signals was optional with the steamer. If they were not used it was not fault on her part. The fact that the signals were optional must be presumed to have been within the knowledge of the master of the barkentine, and he was not entitled, therefore, to rely on receiving them.

The obligation laid on the barkentine, by the rules, to hold her course, was not an iron-clad rule to be followed under all circumstances without regard to the probable results. But the obligation rested on both vessels, and on the barkentine as strongly as on the steamer, to do whatever lay in their power to avoid an impending collision.

"Art. 23. In obeying and construing these rules, due "regard shall be had to all dangers of navigation, and "to any special circumstances which may render a de-"parture from the above rules necessary in order to "avoid immediate danger." (23 U. S. Stat., p. 442.)

The captain of the barkentine was not entitled to wait for the steamer to do something which she might or might not do at her pleasure, or to assume that she would exercise the option allowed by the rules.

There was no law which required the barkentine, while holding her course, to maintain the same rate of

speed in the face of an impending collision. On the contrary, on hearing the whistles of the steamer, and there is no question that the steamer's whistle was thrice heard by those on the barkentine, and the fact is so found by the Circuit Judge (Rec., p. 82, fol. 138), it was her duty to reduce her speed as far as possible, and to take any other precautions which the ordinary practice of seamen suggested, to avoid the collision.

Whether she had enough men on deck to take effective measures for avoiding the collision, is of no moment. The only persons on deck were the man on the lookout, the man at the wheel, the captain, and the mate. If these were not sufficient, the remainder of the crew should have been called on deck promptly.

The learned District Judge held the barkentine in fault on this account, and his view of the question is sustained by the cases cited in his opinion.

The *Zadok* (L. R., 9 Prob. Div., 17):

Sir James Hannen, President: "Though the whistle "of the *Iduna* was heard once and twice and thrice, yet "no precaution was taken on board the *Zadok* to guard "against a contingency which she was warned might "happen, of a steamer being in a position which re- "quired caution. I am advised that what ought to have "been done was this: That men should have been sta- "tioned to work on the braces and to put the foresails "aback by letting them fly; they would come at once "aback and would tend to throw off the ship's head by "putting the helm to starboard, and when the vessel "was seen * * * there would have been time then "to effectuate that movement which might have had "the effect of avoiding the collision altogether. Instead "of that, no preparation was made to do anything "aboard the *Zadok*. Those on board seem to have "thought that she being a sailing vessel and the other "being a steamer the former had a right to keep her "course and do nothing. That is not the view I take "nor the view I am advised should be taken."

The *Dordogne* (L. R., 10 Prob. Div., 6, 12):
Brett, L. J.
~~Lord Esher:~~ "As the steamer by her whistle is perceived to be coming nearer in a fog, the sailing vessel ought, if she is under full sail, to take sail off until she brings herself as nearly to a standstill as is possible whilst being under command."

The master of the *Willey* did not in terms claim that because the other vessel was a steamer he had a right to hold his course and do nothing. But he did claim that until the steamer gave him a signal to indicate what she was going to do he had that right, which was a mistake.

The proposition, moreover, is not sustained by the rules. Under the rules he was bound to have due regard to any special circumstances which might render a departure from the rules necessary in order to avoid immediate danger, and he was not authorized to wait for the steamer to do something before he did so.

2. The Circuit Judge was requested on behalf of the *Martello* to find as a fact:

"53. If the master of the *Willey* on seeing the danger had luffed immediately the collision would have been averted." (Rec., p. 87, fol. 150.)

The Circuit Judge refused to find this fact, and the appellants duly excepted. (Rec., p. 100.)

The Record shows that this is the uncontradicted evidence on behalf of the steamer, and that the captain admitted that it occurred to him, and that he "should if he had given me the proper whistles to know what he was going to do." (Rec., pp. 57, 58, fols. 96, 97.)

In other words, with a collision impending it occurred to the master of the barkentine that it might be averted if he were to luff, and yet he deliberately waited before doing so for the steamer to give him certain signals which she was not under obligation to give.

The propositions maintained by the appellant, there-

fore, are that the barkentine was in fault as matter of law—

1. For taking no precautions when the whistle of the steamer was heard once, twice and thrice, to guard against a contingency which she was thereby warned might happen, of a steamer being in a place and position which required caution.

2. For not having regard to the special circumstances which rendered a departure from the rules necessary in order to avoid immediate danger.

III.

The Case of the Steamer.

1. The rule in respect to the findings of the Circuit Court, under the act of February 16, 1875, is stated by this Court, speaking by Mr. Justice Brown, in the case of the *E. A. Packer* (140 U. S., pp. 360, 364), as follows:

"It does not, however, necessarily follow, that this "court is bound to determine the case upon the precise "facts found by the Circuit Court, if in its opinion such "findings are ambiguous, contradictory or incomplete, or "fail to establish a satisfactory basis for a decision. "The Circuit Court is bound to pass upon and find "every material and ultimate fact necessary to a proper "determination of the question of liability, and in case "of refusal to make such finding, an exception may be "taken thereto which can be considered by this court "upon appeal. It can not be that this court is con- "cluded by the finding, for instance, of a single ma- "terial fact tending to show fault on the part of one "vessel, when there is uncontradicted evidence of other "facts which show, either that this fact did not con- "tribute to the collision, or that there were contributing "faults on the part of the other vessel which might "make a case for a division of damages."

The findings made by the court below, embracing the action of the steamer, on this occasion, are not such as

present the entire case as developed by the uncontradicted proofs on the part of the steamer, and are in several respects ambiguous, if not contradictory or repugnant in their terms and effect, and do not furnish a satisfactory basis for the decision.

2. The Circuit Court rested its decision that the steamer was in fault upon its findings, that the speed of the *Martello* was about 5½ to 6 knots an hour, and that three knots an hour would give her good steerage way.

It seems to be conceded, in the opinion of the Court, that this conclusion was reached in the face of the direct testimony of all the officers of the steamer, and upon what is termed "the most persuasive *argument* as to her rate of speed," founded upon "a comparison of the *time* which elapsed with the *distance* traversed between these periods." (Rec., fol. 141.)

The periods given in the findings are the time of the discharge of the pilot, 7.10 a. m., and the time of the collision, 7.50 a. m.

The point at which the pilot was discharged is given as "*about* half a mile to the westward of the perch and ball buoy, *i. e.*, *about* north from the black buoy No. 1," while the place of collision, as given, was "*about* 1¾ miles *about* N. by E. from Sandy Hook lightship." (Findings 4, 15.)

The *distance*, however, between the points or places thus described, is not found at all by the Circuit Court.

It is manifestly impossible, therefore, for this Court to conclude that the Circuit Court was justified in deciding as against the direct testimony of the officers of the steamer, that the *Martello* was moving at the rate of 5½ to 6 knots an hour, while three knots an hour would give her good steerage way.

The findings, therefore, are incomplete, and fail to establish a satisfactory basis for the decision, within the

meaning of the rule laid down by this tribunal in the leading case of *The E. A. Facker*, cited above.

In rejecting the direct testimony of all the officers of the *Martello*, as to the speed of the steamer, and the revolutions her engines were making per minute, and founding a decision upon the "most persuasive *argument* as to her rate of speed," from a comparison of the time which elapsed, with the distance traversed between the periods mentioned, the Court was bound to find the specific fact as to that distance, which constituted a material element of the problem which the Court sought thus to solve.

The findings as made can not be said, therefore, to justify the conclusion of the Court that the *Martello* was in fault.

3. The direct testimony of the officers of the steamer in respect to the speed before the collision, which seems to have been rejected by the Court, in the way mentioned, was to the following effect, as shown by the bill of exceptions in the record:

THOMAS ELDON JENKINS testified:

Q. Tell me what you did in regard to your speed; what orders you gave?

A. I put the telegraph at slow ahead, and then a few minutes after I sent the third mate down to the engineer to the engine-room, to tell him it was foggy, to go quite slow.

By Mr. GOODRICH: Q. How fast were you going at that time?—A. Three and a half knots.

Q. That was at entrance buoy?—A. Yes.

Q. You continued at that rate of speed until you heard the *Willey*?—A. I think slower, because I sent the third officer to the engineer to tell him it was foggy; to go slow; to say go quite slow.

Q. Was it before or after you heard the fog-horn?—A. That was just when the pilot left us.

Q. That means about 3 to 3½ knots?—A. Yes, sir.

Q. Then you had been going faster before that?—A. We might have been, but to be on the safe side, in case the engineer might not think there was a fog I sent the man down to the engine-room to tell him.

Q. Under what speed were you going?—A. Slow ahead.

Q. How many miles does that carry you in slack water?—A. About 3½ to 4 knots; might be 3½.

JOHN MAIDER.

By Mr. THOMSON: Q. How long did you keep at 28? A. Till about 7.20, I think; somewhere near about 7.20. The third mate came then and gave me orders to let the engines go as slow as possible.

ROBERT J. NICHOLSON, for the *Martello*, testified:

By Mr. THOMSON: Q. What happened then, after that; how long did they keep on making that rate that you speak of?—A. Until about a quarter past seven, as I remember. The third mate came down and ordered the engines to be slowed down.

REGINALD HORNCASTLE, for the *Martello*, testified:

By MR. THOMSON: Q. Did you continue to go at the same rate from the time the pilot left you up to the time of the collision?—A. No.

Q. In what respect did it differ?—A. We were going slow ahead by the engine. I went down and told the engineer by the captain's orders, to let her go as slow as possible; the fog was very thick.

Q. Who did that; you?—A. Yes, sir; I did that.

Q. When was that?—A. About 20 minutes past 7.

Q. The directions were to go slower than they were going?—A. Slow as they possibly could.

By Mr. GOODRICH: Q. Do you know what time you took the order to the engineer to go dead slow?—A. I should think about 20 minutes past 7.

ARTHUR BRADLEY STOUT, for the *Martello*, testified:

Q. Do you know anything about the ship's being slowed up after she left the pilot?—Yes, sir; the telegraph was set slow. I heard the captain tell the third

mate to go down to the engine room and tell them to put it slow.

CHARLES BILLINGTON, on behalf of the *Martello*, testified :

Q What is full speed with your vessel ?—A. I have seen her going 13½.

Q. What do you call her full speed on the telegraphic signal ?—A. That is the usual speed—about so many pounds of steam ; I don't know how many pounds.

Q. 13½ knots is what you call full speed ?—A. No, sir ; the average is about 11. I have seen her going 13½ knots and I have seen her going less.

Q. You have seen her going 13½ ?—A. I have.

Q. In ordinary sailing ?—A. No ; on the trial trip.

Q. Never since ?—A. No, sir ; never since the trial trip.

Q. How much have you seen off the trial trip ?—A. 12 to 12½.

JOHN MAIDER, on behalf of the *Martello*, testified :

Q. What did you do then ?—A. I reduced them 4 revolutions to 24.

Q. Was that as slow as possible ?—A. Yes, sir.

Q. What do you call as slow as possible ?—A. As slow as we could steer, to give the ship steering way.

Q. Did you keep at 24—how long ?—A. Till I received orders by telegraph to go full speed astern.

Q. Was that before or after the collision ?—A. Before the collision.

Q. When did you get that order ?—A. 7.50.

By Mr. GOODRICH : Q. How fast have you known your steamer to go ?—A. By engines or by the ship ?

Q. How many knots an hour ?—A. It depends upon the weather. I have known her to go 12 and I have known her to go 10.

Q. Have you known her to go 13 ?—A. No.

Q. Have you known her to go 12 ?—A. Yes.

Q. With how many revolutions ?—A. 58.

Q. Is that the highest number you remember ?—A. Yes, sir ; 58.2.

Q. How many revolutions do you make when you

are simply turning over your wheel?—A. The engine just going as slowly as possible?

Q. Yes.—A. About 22 to 23.

Q. Can't you go slower than that?—A. No.

Q. Why not?—A. Stop altogether.

Q. You say 24 is the lowest you can go?—A. Yes—not the lowest we can go, but the lowest to get steerage way on the ship.

By Mr. THOMSON: Q. When you speak of full speed, do you refer to full speed of the engines or full speed of the steamer?—A. Full speed of the steamer.

Q. And what is the highest, do you say; what is the highest speed of the engines that you gave there?—A. 58.2.

ROBERT J. NICHOLSON, in behalf of the *Martello*, testified:

By Mr. THOMSON: Q. What happened then—after that; how long did you keep on making that rate you speak of?—A. Until a quarter past 7, as I remember. The third mate came down and ordered the engines to be slowed down.

Q. Were they slowed?—A. As slow as possible, sir.

Q. How low?—A. About 23 to 24.

Q. How long did they keep along?—A. Until 50 minutes past 7. (Rec., pp. 70–73.)

This was the evidence in the case, and on that evidence the counsel for the *Martello* asked the Circuit Judge to make the following findings of fact:

26. The *Martello* at the instant of sighting the barkentine was proceeding slowly ahead, the engines working at about 24 revolutions per minute.

27. The lowest speed at which the engines could be worked to give the *Martello* good steerage way was 24 revolutions per minute.

72. After discharging the pilot the steamer proceeded on at about 28 revolutions of the propeller per minute.

74. At about 7.20 the captain of the *Martello* directed the third officer, orally, to go down to third engineer and tell him to go as slow as he could.

75. The third mate went down to the engine room and delivered the message from the captain, to go as slow as he could, to the engineer.

76. The engineer received the message through the third officer, and thereupon reduced the engines to 24 revolutions per minute.

77. The engines were continued at 24 revolutions per minute until they were reversed at full speed at the time or shortly before the barkentine was sighted.

The learned Circuit Judge refused to make these findings of fact as requested (Rec., p. 88, fol. 153; p. 90, fol. 158), and the appellants duly excepted to the refusal of the Court to find as requested. (Rec., pp. 99, 102; exceptions 65, 66, 67, 104, 105, 106, 107, 108.)

The appellants maintain that these facts were material. The responsibility upon the steamer was to reduce her speed in the fog to the lowest limit consistent with good steerage way. She could not reduce her speed below that limit, nor could she go at a greater speed than would give her good steerage way. And the uncontradicted evidence is that at the time of sighting the barkentine, and for at least half an hour prior thereto, the engines of the steamer had been making only 24 revolutions per minute, and that 24 revolutions per minute were the lowest at which the engines could be worked to give the steamer steerage way.

The Circuit Judge found that the steamer was going 5½ to 6 knots an hour in the fog, and that such speed was immoderate. The finding is based on other findings made on disputed testimony as to the place of collision and the place where the pilot was discharged, and a computation of the time occupied in traversing the distance between those two points, and, as has been seen, the distance between the two points mentioned is not found by the Court.

It seems that while the Circuit Court regarded the

direct testimony of the officers of the steamer as entirely satisfactory as to the rate of speed necessary to give her steerage way, it deemed it proper to reject the same testimony in respect to the actual speed of the steamer before the collision, which shows upon its face that, mechanically, it was *impossible* for the steamer to be making from 5½ to 6 knots per hour.

The testimony is uniform that the engines were making twenty-four revolutions per minute, and twenty-four revolutions per minute would only give the speed necessary for good steerage way. Mechanically and physically, therefore, the steamer was only going at a speed necessary for good steerage way. Such evidence cannot properly be disregarded by a court charged by law with the determination of facts.

According to the evidence of material facts bearing upon the question of the speed, the steamer had the lowest rate of speed consistent with safety to herself and other vessels in her neighborhood.

The appellants maintain that the facts referred to as proven by the uncontradicted testimony of the officers of the steamer should have been found by the Circuit Court, according to the requests on the part of the counsel for the *Martello*, and that it was error not to find them.

The decision of the Court refusing those requests imported that, in the view of the Court, the facts mentioned were not material facts in the case.

That view, however, can scarcely be accepted. The facts were material. They related to the actual orders given and obeyed by the officers of the steamer for the purpose of reducing the speed to the lowest limit consistent with good steerage way, and the actual number of revolutions of the engine, before the collision, and the actual speed which that number of revolutions

would and did give the steamer, according to mechanical principles, which could not be deceptive, illusory, unsatisfactory, or inconclusive.

As against an "argument" founded upon doubtful facts as to a supposed distance traveled, in a given time, there would seem to be no question that the mechanical facts to which the testimony related, were and are of controlling legal importance in the present case, and should have been found, as requested, by the Circuit Court, for the consideration of this Court on appeal.

The rule in respect of moderate speed does not require that a vessel in a fog shall not go at 5½ or 6 knots, or any other number of knots per hour. It does require that she shall go at a moderate speed.

What is a moderate speed is a question not of knots, but of existing circumstances, and what would be a moderate speed for one vessel would be an immoderate speed for another. As the Circuit Judge found in this case, the moderate speed required by the rule is not a fixed rate of knots per hour, but something materially less than the vessel's full speed.

The construction which has always been given to this rule is that to bring herself within the rule a vessel must show not that she was going at a fixed rate of knots per hour, but that she had moderated her speed down to the standard of good steerage way. (*The Zadok*, L. R. 9, Prob. Div., 17; *The Beta*, *Id.*, 134.)

Any fact which showed that the steamer had brought herself within this rule was a material fact, and if supported by uncontradicted evidence should have been found by the Circuit Court.

The facts as to the speed of the engines were, therefore, material facts; they were supported by uncontradicted evidence; and it was error for the Circuit Court to refuse to find them.

4. The findings of fact made by the Circuit Court are also imperfect and unsatisfactory in respect to the time at which the steamer ported her helm and reversed her engines, for the purpose of preventing a collision.

The testimony on the part of the steamer showed conclusively that the steamer reversed at full speed, and ported her helm, when the horn of the barkentine was heard, which was almost simultaneous with her appearance through the fog.

The Circuit Judge found as a fact :

"7. About a minute or two after hearing the horn the "officers of the *Martello* saw the barkentine *Freda A.* "*Willey* looming in sight through the fog." (Rec., p. 81 ,fol. 137.)

The Circuit Judge also found as a fact :

"12. While thus proceeding she (the barkentine) "thrice heard the steamer whistle of a steamer, answer- "ing promptly each time with a single blast of her "horn ; *at this last signal* the *Martello* appeared in "sight bearing about four points on the port bow, and "a quarter of a mile away."

These findings are by no means consistent. While the first is that "about a minute or two" after hearing the horn, the *Martello* saw the barkentine, the second is that "*at* this last signal" (a single blast of the horn) the *Martello* was seen by the barkentine.

The appellants excepted to the seventh finding as not sustained by the evidence. (Rec., p. 92, fol. 161.)

The evidence fails to disclose any basis to support this finding. The master of the steamer says he put the engines astern before he *saw* the barkentine and she loomed in sight a *moment* or two, not a minute or two, after hearing the horn. He defines the word "moment," as used by him, as "ten or twelve seconds." (Rec., p. 21, fol. 35.)

The second mate said "*at* the same as I heard it (the horn) she hove in sight almost immediately."

The two seamen who testified on the subject said it must have been about a minute between hearing the horn and sighting the barkentine, but this was the evidence of men who were in all probability not accustomed to carry watches, and their idea of time was not entitled to any consideration as against the testimony of the master and first officer. The seamen knew nothing about the reversal of the engines. There is no evidence to sustain the finding that "a minute or two" elapsed between hearing the horn and sighting the barkentine, and the testimony of the master of the barkentine corroborates the testimony of the steamer's witnesses.

"Q. At what time in relation to either of these three "whistles did you see the *Martello?*—A. *I seen her "when I was blowing the last one.*" (Rec., p. 47, fol. 78.)

The Circuit Court erred, therefore, in finding that "a minute or two" elapsed between the hearing of the barkentine's horn and her appearance in sight to the people on the steamer.

5. The appellants submit that the findings, as presented, do not justify the conclusion adduced, that the steamer was guilty of fault on account of her speed, and was responsible for the collision.

The material facts established by uncontradicted evidence, and embraced by the requests for findings, show that the steamer was proceeding carefully in the fog at as slow a rate as was consistent with good steerage way, that all possible efforts were made by her to avoid the collision, and that she was not responsible for the disaster.

IV.

The Freda A. Willey was solely responsible for the collision.

It is submitted, on the part of the appellants, that it can not be said that this collision was caused by the steamer. The fog was dense. The barkentine was

heard by the steamer as soon as it was possible to hear her, and she was seen as soon as it was possible to see her. Under the twelfth finding, it would appear that the barkentine was not heard before she was seen. In that view of the matter the distance then intervening between the two vessels was such as to render it impossible for the steamer to avoid the barkentine, even had the speed of the steamer been much less than it was. But going as the steamer was, and her ability to do what she did, when the barkentine was seen, render it quite clear that if the barkentine had been heard somewhat sooner than she was, the steamer would have avoided the barkentine. The steamer would have stopped her engine until the barkentine was seen.

The latter could not, by her tin fog-horn, make her presence known before she did. Had she been able to make her presence known somewhat sooner, there would have been no collision. A mechanical fog-horn would, no doubt, have accomplished what the tin fog-horn used failed to accomplish. In using a tin fog-horn, blown by the mouth, the barkentine violated the law, and this failure to comply with the law should be held to be a fault which brought about the collision that ensued, and which rendered the barkentine solely responsible for the disaster.

V.

The decrees of the Circuit Court should be reversed and the causes remanded with instructions to enter decrees dismissing the original libel with costs to the appellants, and in the cross-libel adjudging that these appellants recover their damages against the barkentine with costs.

J. HUBLEY ASHTON,
DAVID THOMSON,
Of Counsel for Appellants.

FOSTER & THOMSON,
Proctors for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM, No. 293.

THE BRITISH STEAMER MARTELLO, &c., CHARLES H. WILSON, *et al.*,

Claimants–Appellants,

vs.

ICHABOD WILLEY, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

GOODRICH, DEADY & GOODRICH,

Proctors for Appellees.

WILLIAM W. GOODRICH,

Of Counsel.

United States Supreme Court,

OCTOBER TERM, 1893.

The British Steamship MARTELLO, etc., CHARLES HENRY WILSON and ARTHUR WILSON, Claimants,

Appellants,

vs.

ICHABOD WILLEY, Libellant,

Appellee.

No. 293.
Brief for the Freda A. Willey.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants,

Appellants,

vs.

The Barkentine FREDA A. WILLEY, etc., WILLIAM H. PARSONS *et al.*, Claimants,

Appellees.

Facts as Found by the Circuit Court Judge.

On April 24, 1887, the barkentine Freda A. Willey left Pensacola bound through Long Island Sound for New Haven with a cargo of yellow pine

lumber, and on Sunday, May 8, about 8 o'clock A. M., was bound into the harbor of New York (R., fol. 136, 8th finding).

There had been a dense fog during the night, and at the time of the collision it had grown denser so that vessels could not see each other at a distance of over a quarter of a mile (6th finding).

About 4 A. M. the Willey was sailing with her mainsail, spanker, main staysail, upper and lower foretopsails, fore topgallant sail, and three jibs. At 5 A. M. the wind freshened and she took in her royal. At 7 A. M., the wind freshening, her foresail was hauled up (10th finding).

On the deck of the Willey before the collision were Cobb, able seaman on the lookout, Mathlin, able seaman at the wheel, Ludvigsen, second mate and Willey, the captain, about her deck, the rest of the crew being below (11th finding).

The Willey was heading north, close-hauled on the starboard tack, and was sounding her horn at intervals of one or two minutes, and was making about four knots an hour (11th finding).

When the Willey arrived at a place about $1\frac{3}{4}$ miles about north by east from Sandy Hook Lightship, the Martello ran into her with great violence, striking her on the port bow, cutting her way into the keel of the Willey and knocking her stem over to starboard and driving her bow round to eastward (15th and 17th finding).

[The Willey claims that the location of the collision was still farther to the eastward than the point thus indicated by the Circuit Court, and the learned Circuit Judge, in his opinion, while adopting the location as fixed by the District Court stated as follows: "I am inclined to the opinion that it lies somewhat farther to the eastward" R., fol. 141.]

While proceeding as above stated the Willey heard the Martello's steam whistle three times and each time answered promptly with a single blast of

her horn ; at the third and last signal the Martello appeared in sight, bearing about four points on the port bow and a quarter of a mile away (12th finding).

As soon as the Willey came in sight the first officer of the Martello called out, "hard-aport," the lookout reported a vessel on the starboard bow, and the captain immediately ordered the helm hard-a-port and the engines reversed at full speed (13th finding).

The speed of the Martello under the hard-aport helm and engines reversed at full speed became gradually reduced, and, at the time of the collision, was about two knots an hour (14th finding).

The steamer did not stop when she heard the horn of the Willey, this being a minute or two before the Willey came into sight, and at no time did she give any signal or indication showing whether her intention was to go ahead of the barkentine, or astern, or even whether she had reversed her engines, in accordance with the provisions of the nineteenth article of the rules for preventing collisions at sea (7th and 17th findings).

The Martello is a British steamship of 2,439 tons register, 370 feet in length. She left her dock in Jersey City, on Saturday afternoon, May 7, bound for England, but the weather was so foggy that she had to anchor for the night in Gravesend Bay (1st and 2d findings).

She got under way from Gravesend Bay about 6 A. M. Sunday, May 8, the weather being thick, but sufficiently clear to enable the buoys marking the channel to be seen. She proceeded down the Swash Channel, then through Gedney's Channel to sea. When about half a mile to the westward of the Perch and Bell Buoy, *i. e.*, about north from the Black Buoy, No. 1, her engine was stopped for the purpose of slowing the vessel until the pilot could be discharged, and this being done the engines were at 7:10 moved slow ahead (3d and 4th findings).

About forty minutes after discharging the pilot, viz., at 7:50 A. M., the horn of the Willey was heard on the starboard bow (5th finding).

On the deck of the steamer were Jenkins, the captain and Horncastle, the third officer, on the bridge; Ogden, a lookout, in the crows' nest, about 100 feet abaft the stem; Billington, the first officer, on the lookout on the forecastle; and a quartermaster at the wheel (5th finding).

When the Martello passed the buoy she headed east-southeast, the wind being about east by north blowing a six knot breeze, and the fog had grown denser (6th finding).

The speed of the Martello was about 5½ to 6 knots an hour. (The Willey claims that it was about 8 knots an hour.) Three knots an hour would give her good steerage way (6th finding). [She can make 13½ knots (R., fol. 82).]

About 40 minutes after discharging the pilot, viz., at 7:50, the Martello heard the horn of the Willey, and this was about a minute or two before the Willey loomed in sight through the fog (5th and 7th finding).

The Willey, with all her sails set, can make 10 knots an hour; with the wind as it was, and if going at less than 4 knots an hour would not have steerage way sufficient to give her master sufficient control of her to tack, wear or manage her as occasion might require (9th finding).

The master of the Willey was on deck; he had his vessel under control (19th finding).

If, when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer was starboarding her wheel, he could have ported and avoided the collision. If at that time the steamer had ported her wheel the barkentine, keeping her course, would have crossed the steamer's bow in safety. If at that time the master of the barkentine had been advised that the steamer

was reversing he could have ported and avoided the collision (19th finding).

Had the steamer been going at 3 knots an hour; had she stopped her engines as soon as she heard the Willey's horn, and reversed when she sighted the barkentine, she would have stopped out of the Willey's course (18th finding).

Conclusions of Law as found by the Circuit Court.

First.—The Freda A. Willey was free from all fault.

Second.—The Martello was in fault for proceeding at an excessive rate of speed in a fog, and is solely responsible for the collision.

Third.—There should be a decree for the Freda A. Willey and against the Martello in each case, with costs of the District and Circuit Courts.

Charges of fault in the Pleadings.

The barkentine charged upon the steamer as faults:

1st. That the steamer was going at too high a rate of speed in a fog.

2d. That she did not have a proper lookout.

3d. That she did not see the barkentine in time.

4th. That she did not keep out of the way of the barkentine (R., fol. 4).

The steamer charged upon the barkentine, as faults:

1st. Proceeding at too high speed in a fog.

2d. Not having a proper lookout stationed and set.

3d. Not giving proper signals.

4th. Not blowing her foghorn properly, nor at sufficient intervals.

5th. Managing herself negligently and unskillfully when the collision was impending (R. fol. 8).

It will be observed that the steamer did not allude to the fact or allege that the barkentine was not using a mechanical foghorn as is now claimed; the only allegation as to the foghorn being that she did not blow her foghorn properly and at sufficiently short intervals.

The point, that the barkentine did not have a mechanical foghorn and was not sounding her foghorn by mechanical means, was neither raised in the pleadings nor at the trial in the District Court, nor at the trial in the Circuit Court, nor until several months after the Circuit Court had filed its decision and ruled upon the Martello's original requests to find, and also upon several subsequent batches of requests made after the decision of the Circuit Court.

POINTS.

First Point.

The only available exceptions in this Court are the Twenty-second, Twenty-third, Twenty-fourth and One Hundred and Forty-second.

The first three named are the exceptions of the Martello to the conclusions of law found in favor of the Willey (R., fol. 140).

The 142d exception brings up the refusal of the

Court to find the Willey in fault for not having and using a horn sounded by mechanical means.

All of the other exceptions are rendered unavailable by the rule laid down in the case of the City of New York (147 U. S., 72).

In that case the Court said, at page 76:

"In construing the Act of 1875 the following propositions may be regarded as settled:

1. That the facts found by the court below are conclusive; that a bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings upon which we are authorized to pass are such as might be presented by a bill of exceptions prepared as in actions at law; and that the findings have practically the same effect as the special verdict of a jury (citing cases).

2. That it is only the ultimate facts which the court is bound to find, and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence, from which the ultimate fact is to be obtained (citing cases).

3. If the court below neglects or refuses to make a finding one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and in the other, that there was some evidence to prove what is found, when, in truth, there was none. Both of these are questions of law and proper subjects for review in an Appellate Court" (citing cases).

The decision in that case was the result and climax of a long series of decisions cited by the court

in its opinion. It definitely established the two following propositions:

(A.) The rule is now well settled that this Court will not consider upon appeal:

1. Exceptions to findings of fact in dispute.

2. Exceptions to a refusal to find immaterial facts.

3. Exceptions to a refusal to find evidence instead of facts.

4. Exceptions to a refusal to find conclusions of law based on rejected findings of fact.

(B.) The Court will consider:

5. Exceptions to conclusions of law based on facts found.

6. Exceptions to findings of ultimate and essential facts not supported by the evidence.

7. Exceptions to refusal to find ultimate and essential facts, the testimony to sustain which is uncontradicted.

We have prepared an appendix to show that all of the exceptions, save those noted in the head-note of this point, are excluded as coming within the category of the matters which this Court will not consider, stated above.

Twenty-second Exception:

They further except to the first conclusion of law as found by the Judge herein, and to each and every part thereof.

That is: "1. The Freda A. Willey was free from fault."

Twenty-third Exception:

They further except to the second conclusion of law as found by the Judge herein, and to each and every part thereof.

That is: "The Martello was in fault for proceeding at an excessive rate of speed in a fog and is solely responsible for the collision."

Twenty-fourth Exception:

They further except to the third conclusion of law as found by the Judge herein, and to each and every part thereof.

That is, "There should be a decree for the Freda A. Willey and against the Martello in each case, with costs of the District and Circuit Courts."

142d Exception:

They further except to the failure and refusal of the said Judge to find the additional conclusion of law numbered five, that "the Willey was in fault for not having and using a horn sounded by mechanical means, as required by Article 12 of the International Rules for preventing collisions at sea," as requested.

Second Point.

All of the exceptions fall within the condemnation of this Court, as stated in the Francis Wright (105 U. S., 390), where the Court held that it was fatal to the bill of exceptions that it was prepared in the same manner that the bill of exceptions in this case has been prepared, except that all of the testimony was printed.

The Court closed its remarks on the subject by saying: "From this it is apparent that we cannot on this appeal consider any of the rulings below which have been presented by the bill of exceptions."

I desire to call especial attention to the opinion of the Court in the Francis Wright, because substantially the same course has been pursued in the case at bar.

At the close of the trial in the Circuit Court the appellants presented fifteen requests for findings of fact, and three requests for conclusions of law (R., fol. 132). Subsequently the Court filed its findings of fact and conclusions of law (R., fol. 136). Thereafter the appellants requested the Court to make additional findings of fact, numbered from 16 to 71 inclusive (R., fol. 145). Still later the appellants filed additional requests for findings of fact and law, namely, findings of fact, numbered from 72 to 103, and for one conclusion of law, namely, that the Willey was in fault (R., fol. 153).

After the Court had acted upon these multitudinous requests, the appellants presented two more requests (R., fols. 158, 159).

"104. (Finding of fact) The horn of the Willey on board of her, and sounded on board at the time of the collision was not a horn sounded or to be sounded by mechanical means, but was a tin foghorn."

"5. (Finding of law.) The Willey was in fault for not having and using a horn sounded by mechanical means, as required by Article 12 of the International Rules for Preventing Collisions at Sea."

The Court found the 104th request for finding of fact, and refused to find the 5th conclusion of law.

None of the requests for findings of fact, numbered 1 to 104 inclusive, give any grounds such as are required to be stated by the opinion of the Francis Wright.

I also call attention to the condemnation which this Court visited upon the appellant in the case of Phillips *vs.* Seymour, 91 U. S., 648, where the

Court said: "The practice of unlimited assign-
" ments is a perversion of the rule, defeating all its
" purposes, bewildering the counsel of the other
" side, and leaving the Court to gather from the
" proof often as prolix as the assignment of errors
" which of the latter are really relied upon." A citation which graphically describes the mental condition of the counsel of the appellees on this argument.

Third Point.

The 142d exception is not well taken as this Court will only apply the law to the facts found by the Circuit Court.

The case is left for argument solely upon the 142d exception.

There can be no doubt of the correctness of the decree of the Circuit Court under the following findings of fact:

6th. * * * The fog had grown denser, and vessels could not be seen over a quarter of a mile away. * * Her (the steamer's) speed was about five and a half to six knots an hour. Three knots an hour would give her good steerage way.

5. * * * The horn, one blast of a sailing vessel, was heard on the starboard bow (of the Martello).

7. About *a minute or two after hearing the horn*, the officer of the Martello saw the barkentine Freda A. Willey looming in sight through the fog.

12. * * * At the third and last signal the Martello appeared in sight * * * a quarter of a mile away.

13. *As soon as the Willey loomed in sight* of those on the Martello (but not as soon as she heard the horn), the first officer called out hard-a-port * * the captain immediately ordered the helm hard-a-port, and the engines reversed full speed.

14. The speed of the Martello under a hard-a-port helm and with engines reversed at full speed became gradually reduced, and at the time of the collision was about two knots an hour.

17. From the time of the hearing of the first whistle down to the time of the collision, the steamer, except as stated in the 16th finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines. In consequence the Willey held her course, as she was bound to do, but the steamer ran into her with great violence, the steamer's stem running into the port bow of the barkentine, cutting its way into her keel, knocking her stem over to starboard and driving her bow round to eastward.

18. Had the steamer been going at three knots an hour, had she stopped her engines as soon as she heard the Willey's horn, and reversed when she sighted the barkentine, she would have stopped out of the Willey's course.

19. The master of the barkentine was on deck; he had his vessel under control. If, when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer was starboarding her wheel, he could have ported and avoided the collision. If, at that time, the steamer had ported her wheel, the barkentine, keeping her course, would have crossed the steamer's bow in safety. If, at that time, the master of the barkentine had been advised that the steamer was reversing he could have ported and avoided the collision.

These findings of fact render the conclusion of law that the Martello was solely in fault unassailable.

(1.) The Martello going at a speed of 5½ or 6 knots reduced her speed to two knots at the collision.

(2.) If the Martello's speed had been three knots her speed at the collision would have been at least proportionately reduced so that she could not have reached the Willey.

(3.) If the Martello had stopped as she was bound to do as soon as she first heard the horn, that is about a minute or two before she saw the Willey, she could not have reached the Willey.

Cunard S. S. Co. *vs.* Fabre, 1 U. S. A., 653.
The North Star, 43 F. R., 807.
The Normandie, 43 F. R., note at p. 160.

(4.) If the Martello had been going at three knots, that is, 300 feet a minute or 600 feet in two minutes, and had stopped as soon as she heard the horn, she could not have reached the Willey, but inasmuch as going at 5½ or 6 knots, she traversed in a minute 550 or 600 feet and in two minutes 1,100 or 1,200 feet, she reached the Willey on account of her speed and failure to stop as soon as she heard the horn.

(5.) If the Martello had stopped as soon as she heard the horn even going at 6 knots, the Willey going at 4 knots, that is, 400 feet in a minute, would have sailed 400, or in 2 minutes 800 feet, and as her length was only 140 feet (R., fol. 65), she would have passed beyond and across the track of the Martello in the minute or two minutes.

Thus it is demonstrated upon the findings of fact that the collision did not result from the failure to sound a mechanical foghorn, inasmuch as the Mar-

tello heard the horn a minute or two before she saw the Willey, but did not stop as soon as she heard the horn as she was bound to do and wait until all risk of collision with the Willey had passed away. If she had stopped as soon as she heard the horn there would have been no collision.

The Normandie (*supra*).

Fourth Point.

The Circuit Court properly held that the Willey was not in fault for not sounding a mechanical foghorn.

(1st.) The defence of the failure to use a mechanical foghorn, is clearly an afterthought of the steamer, not raised in the pleadings, nor at the trials in either the District or Circuit Courts. Indeed, the steamer did not raise the point till after the Circuit Court had passed upon all previous requests. The hearing occurred June 3d, 1889. The decision was rendered July 31, after which the appellants' counsel twice filed additional requests for additional findings, without reference to this particular request. On October 4th all the requests had been passed upon by the Court. Still later, and in July, 1890, the request for these two findings was for the first time presented and passed upon.

Such a practice, if allowed consideration, is calculated to put the appellee at a disadvantage. If the point had been raised at the trial, additional evidence might have been produced by the appellee to sustain the finding of the Circuit Court that the barkentine was not in fault. But I do not think any such consideration is essential. It may also be observed that the Court has been deprived of

any opinion from the Circuit Court of its views and reasons upon the question involved.

The barkentine's libel alleged that the vessel was "seaworthy," which is not controverted.

It also alleged that "a foghorn had been, and then was, blowing on said barkentine one blast at intervals of less than two minutes, the same having been blown by the libellant himself (Captain Willey) from the time the steamer was seen."

The answer of the steamer contains no denial of these two allegations It alleges that the horn was heard on the steamer, and that simultaneously the helm was put hard-a-port and the engines reversed. The charge of fault was simply that the bark "did not blow her foghorn properly, nor at sufficiently short intervals."

The steamer cannot claim, therefore, that she was not fairly and frankly advised by the libel of the fact that the horn was being blown by the master of the barkentine. There was no allegation that it was being sounded by mechanical means. If the steamer desired to raise the point that the failure to sound by mechanical means was a contributing cause of the collision, fairness required a definite issue on that subject, so that other evidence, if needed, might have been introduced to show that the method of sounding the horn did not contribute to the collision. The rule that a suitor is not permitted to prove what he has not alleged applies with especial force to a case where, as in the present instance, a suitor seems to have studiously avoided putting his opponent in a position to defend upon a point which was not raised until all opportunity to present evidence had passed away.

(2d.) The general principle is that an Appellate Court will only revise the decisions of the Court below, and that it will disregard objections which ought to have been, but were not, taken before that Court.

"The record shows that this ground of defence was not brought to the consideration of the Circuit Court. We do not, therefore, feel ourselves at liberty to express any opinion upon the question."

Bell *vs.* Bruen, 1 How., 187, 188.

"It has been suggested on the argument here that this grant is a fictitious one made by the Governor to the Secretary of the Territory, according to the forms of law, for the purpose of defrauding the United States. One answer to the suggestion is that no objection as to the *bona fides* of the grant was taken before either of the tribunals below, where it should have been made, if relied on by the Government, so as to have given the claimants an opportunity to have met it. To permit it to be taken in the Appellate Court for the first time, where there is no opportunity for explanation, would be a surprise upon them of which they might justly complain. The commissioners say, 'the grant is fully proven, and we find no cause to doubt its genuineness.' And the Judges of the District Court observe, 'that the grant is fully proved; nor is its genuineness called in question.'"

The U. S. *vs.* Larkin, 18 How. Rep., 561 & 562.

There are many other cases which refuse consideration of exceptions not fairly taken during the trial of the Court below, on the ground that the appellee is taken at an unfair advantage.

Newell *vs.* Nixon, 4 Wall., 583.
Railroad Co. *vs.* Lindsay, *Ib.*, 656.
Washington R. Co. *vs.* Bradleys, 10 Wall., 299.
Edwards *vs.* Elliott, 21 Wall., 557, 558.
Wilson *vs.* McNamee, 102 U. S., 574.
Belk *vs.* Meagher, 104 U. S., 279.
Clark *vs.* Fredericks, 105 U. S., 4.

I am not unmindful of the fact that the opinions in several of these cases cited use the language that the objection was not brought to the attention of the Court below either at the trial *or in the findings*, and that in the case at bar there was a request for finding that the Willey was at fault for not using a mechanical horn ; but this request does not obviate the difficulty. If the point had been raised in the District Court, expert evidence might have been adduced to show that the steamer should or might have heard the mouth horn, if her watch was vigilant, or that the mouth horn was equally audible with a mechanical horn, or this might have been shown by an exhibition in open Court of the relative sound force of the mouth horn which was used, in comparison with any mechanical horn. Indeed, mechanism might have been attached to this particular horn and an exhibition of its powers presented physically to the Court. It cannot be claimed that if any mechanism had been attached to this horn, even a common bellows, this would not have been a compliance with the rule.

(3.) *Prima facie*, a vessel which does not obey any of the collision rules is at fault, but this only puts upon such vessel the burden of showing that her failure did not contribute to the collision.

This is established by abundant authority.

The Pennsylvania, 19 Wall., 125.
Shirley *vs.* The Richmond, 2 Woods, 58.
The Mary T. Wilder, Taney, 567.
The John H. Starin, 2 F. R., 100.
The Margaret *vs.* The C. Whiting, 3 F. R., 870.
The Buckeye, 9 F. R., 666.
The State of Alabama, 17 F. R., 854.

It was assumed by both parties in the lower Courts that such was the fact and that the failure

to sound a mechanical foghorn was not a fact which contributed to the collision, and this assumption is clearly borne out by the evidence and by the findings of fact and law.

It does not appear by any evidence that a mechanical foghorn can be heard farther than a mouth horn, and the Court will not assume such a fact in order to reverse a well-considered judgment of the Circuit Court.

Nor does it appear that a mechanical horn is required by the rules for the reason that a mechanical horn emits a louder sound, or can be heard at a greater distance than a mouth horn. I respectfully submit that the object of a mechanical horn is to insure a regular sounding and to prevent a failure to sound, which might occur through the weariness of the person sounding; but it appears by the evidence that the foghorn was being regularly sounded by the mate for some time before the approach of the steamer, at intervals of less than two minutes, and that when the master of the Willey heard the whistle of the steamer he took the horn from the mate and sounded it himself three times in answer to the steamer's three blasts. In other words, there was "a fresh hand at the bellows."

Besides, the horn was heard aboard the steamer in abundant time to have avoided the collision.

The Court found this in clear terms even before this final and belated request for a finding was made by the appellants.

"18. Had the steamer been going at three knots an hour, had she stopped her engine as soon as she heard the Willey's horn and reversed when she sighted the barkentine, she would have stopped out of the Willey's course."

"19. The master of the barkentine was on deck; he had his vessel under control. If when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer was

starboarding her wheel he could have ported and avoided the collision. If at that time the steamer had ported her wheel, the barkentine keeping her course would have crossed the steamer's bow in safety. If at that time the master of the barkentine had been advised that the steamer was reversing, he could have ported and avoided the collision."

These findings make it perfectly certain that the barkentine's failure to use a mechanical foghorn in no way contributed to the collision, and that such failure was not a contributing cause of collision and places no burden of negligence upon her.

The findings show that the steamer heard the horn of the bark before she saw her, but that she did not stop when she did hear the horn, and it may be assumed that she would not have stopped if she had heard the horn before, and of course at a greater distance and more faintly.

The steamer on hearing the horn of the Martello should have stopped at once and reversed. The Circuit Court finds that such a course would have avoided the collision.

The Lepanto, 21 F. R., 651, 659.
The Geo. D. Fisher, 21 How., 1, 6.
The City of Atlanta, 26 F. R., 461, 462.
The Ebor, 11 Pro. Div., 25.
The Falkland, L. R., 4 Priv. C., 529, 533.
The Dordogne, 10 Pro. Div., 6.

The case therefore falls within the law as laid down in the cases cited, and the findings of fact as supported by the evidence are conclusive to show not only that probably her fault did not contribute to the disaster, but that certainly it did not, and that it could not have done so, as laid down in the Pennsylvania, or that even if the barkentine had sounded her horn by mechanical means it

would have made no difference and conveyed no additional or earlier information to the other vessel.

Fifth Point.

The Martello was proceeding at immoderate speed in a dense fog, and this was the proximate cause of the collision.

The Circuit Court, like the District Court, found her speed to be 5½ to 6 knots the hour. The appellee claimed that her speed was considerably greater.

Three knots an hour would give her good steerage way (6th finding).

The findings of fact locate the collision about 1¾ miles about N. by E. of the Sandy Hook lightship (see U. S. Chart). The Willey claimed that it was still further to the eastward.

The pilot left the ship about north from the black buoy No. 1, and this is over four and a half miles from the place of collision, as shown by diagram hereto annexed marked A.

The vessel traversed that distance between 7:10 "slow ahead", and 7:50, "Full speed astern," that is in forty minutes, and it is evident that the steamer was proceeding at the rate of over six knots an hour (see engineer's memorandum R., fol. 13, and engineer's log R., fol. 36).

The Court found that the horn of the barkentine was heard aboard the steamer, about forty minutes after the discharge of the pilot, which was at 7:10, and that a minute or two after this the barkentine loomed in sight through the fog; that the engines of the Martello were reversed, and her

headway reduced to two knots at the instant of collision. It follows that the Courts below placed a very low estimate upon the speed of the steamer.

The diagram attached, hereto annexed marked B, demonstrates mathematically that the speed of the Martello was over 6 miles an hour.

The Willey between 4 and 8 o'clock sailed 16 miles, her speed being substantially the same during the whole of that period; her speed was therefore properly found by the Circuit Judge to be 4 miles an hour.

When the Martello was seen she bore 4 points on the Willey's port bow (12th finding).

This finding of fact was not excepted to.

The Willey was sailing North and making four knots (11th finding).

The appellant only excepts to so much of the 11th finding of fact as found that the barkentine was sounding her horn at intervals of 1 to 2 minutes and that she was sailing close hauled (see 11th Exception).

The Martello was sailing east southeast (6th finding).

This finding was not excepted to. The appellant excepted only to so much of the 6th finding as found that three knots an hour would give the Martello good steerage way (see 6th Exception).

She was a quarter of a mile distant from the Willey (12th finding).

These points are shown by diagram B:

"A" represents the Willey at her first sight of the Martello.

"B" is the point of collision.

"C" is the point where the Martello was first seen by the Willey.

The distance from B to C, is about one and three-quarter times as great as the distance from

A to B; therefore, while the Willey was traversing the distance from A to B, at the rate of four knots an hour, the Martello was traversing the distance from C to B, a distance 75 per per cent. greater; and, if the speed of the Willey was 4 knots, the speed of the Martello must have been 7 knots.

The distance between B and C will be largely increased if the Willey sighted the Martello four and a half points off the port bow, and very little decreased if the Martello was sighted three and a half points off the port bow.

Even if she was sighted three and a half points off the port bow, the distance between B and C would be one-half greater than the distance between A and B.

The law, as to moderate speed in a fog, is very clearly stated in the following citations:

The Europa, Jenkin's Rules Road, 52, where the Privy Council said: "This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has the right to navigate at such a rate that it is impossible for her to prevent damage, taking all precautions at the moment she sees danger to be possible; and if she cannot do that without going less than five knots an hour, then she is bound to go less than five knots an hour."

The Hammonia (11 Blatch., 414), Judge Woodruff says: "If there was not time, after the sound of the foghorn from the bark became audible on the steamer, for the latter to slow and deliberate sufficiently to learn the position and course of the bark, and thereupon take the proper measures to avoid her, *that fact shows* per se, *that the steamer was moving at too great speed.* In a fog so dense that another vessel cannot be seen, it is the duty of a steamer to move at such a rate, and with such

control of herself, that, when apprised, by the means prescribed by statute, of the neighboorhood of a sailing vessel, she can slow or stop in season to learn the position and course of the latter, and what measures are suitable and proper to avoid her" (Cited and approved in The City of New York, 35 Fed. Rep., 609).

M'Cabe *vs.* Old Dominion Steamship Co. (31 Fed. Rep., 238). The steamer was proceeding at the rate of seven miles an hour, in very foggy weather, but when objects could be seen from 300 to 350 feet away.

This was held to be immoderate speed.

The Court said: "The general rule is, that a steamer should always be under such control as to be stopped and reversed within the distance at which an approaching vessel can be seen. In cases of collision, to exonerate a steamer, it must be shown that she had taken every reasonable precaution to meet an emergency which might arise, and that she was not guilty of a want of ordinary care, caution, or maritime skill."

The Colorado, 91 U. S., 692. The Court held five or six miles immoderate speed.

The Pottsville, 12 Fed. Rep., 633. The Court held four miles immoderate speed.

The Luray, 24 Fed. Rep., 751. The Court held five and one-third miles immoderate speed.

The Eleanora, 17 Blach., 88, five and a half miles held fault.

The Bolivia, 1 C. C. A., 221. The Bolivia, in a fog off Fire Island, ran down the schooner Smith. Her ordinary speed was eleven knots; in a fog it was seven or eight knots. She saw the schooner 300 or 400 feet distant.

The Court held the Bolivia responsible, citing the Colorado, the Nacooche, the Europa and Batavia (briefed above), as authority for its enunciation of the law in the following words:

"Under such circumstances it is not enough that the steamship moderated her speed; she should have reduced it to that moderate speed which was safe and prudent in view of all the circumstances and conditions of the case. The rule is firmly established in this country and also in England that the speed of a steamship is not moderate at least in localities where there is a likelihood of meeting other vessels if it is such that she cannot reverse her engines and be brought to a standstill within the distance at which in the condition of the fog she can discover another vessel."

Sixth Point.

The steamer was also at fault in not instantly stopping when she heard the barkentine's foghorn before she sighted her.

She had knowledge of the direction of the wind. She heard the foghorn a single blast ahead before sight and ought to have known thereby that it came from a sailing vessel and that such vessel was on her starboard tack and was crossing her bow. Her failure to stop her engines was the proximate and sole cause of the collision.

(See Collision Rules, Article 12, Sub. b.)

Cunard S. S. Co. *vs.* Fabre, 1 U. S. A., 653.

The North Star, 43 Fed. Rep., 807.

Seventh Point.

If the steamer had complied with the instructions of the 19th Article of the International Rules, the collision could easily have been prevented.

If for instance the steamer, even when she first saw the barkentine, had given one short blast of her whistle the master of the barkentine would have heard the signal and understood it to mean, "I am directing my course to starboard and am not reversing;" then the barkentine by keeping her course would have avoided collision.

If the steamer had given two short blasts of her whistle the barkentine would have understood, "I am directing my course to port and am not reversing," and the barkentine would have gone to star board and cleared.

If the steamer had given three short blasts, the barkentine would have understood, "I am going full speed astern," and gone to starboard.

But without any signals in accordance with the 19th rule, the barkentine could not do, and was not bound to do anything except keep her course, and to have done otherwise even *in extremis* would have burdened her in this action with the necessity of giving some excuse for her change of course.

That this is a correct view of the case is substantiated by Captain Willey's evidence, R., fol. 61 *et seq.*

Of course a steamer is not peremptorily ordered by the 19th article to sound such blasts, but the option of the article rises to the dignity of a command when a steamer in a fog is navigating waters which are always crowded.

It is perfectly certain that if she *had* given the signals, which she might have given, and which under the rule she would not have been in fault for giving, there would have been no collision,

since a sharp, active, alert master, like Captain Willey, was standing on his quarterdeck and listening for signals which he was prepared to obey instantly.

Place in sharp contrast with this the fact that the barkentine was bound to keep her course and that the Court might have condemned her at least in partial damages if a collision had resulted from changing her course, and we are authorized in asking the Court to emphasize again, as it has so often done, the necessity for strict obedience on the part of a sailing vessel to the rule which requires her to keep her course in the face of an approaching steamer unless it is perfectly certain at the time to those in charge of her that she can safely do otherwise.

I can make no argument on this subject which will equal the clear exposition of Captain Willey as to what course he would have pursued if the steamer had obeyed the 19th article (R., fol. 62).

Eighth Point.

The barkentine was not proceeding at immoderate speed.

The District Judge held that the barkentine was also in fault simply because she was going at four knots, which he held to be excessive speed. But the learned Judge seems to have lost sight of the fact that the uncontradicted evidence of the barkentine's officers shows that she could not take off any of her sails or go at a less rate of speed and have steerage way, and the Circuit Judge came to this conclusion as a question of fact (see also Opinion, R., fol. 144).

The barkentine's speed was four knots (9th finding).

The barkentine's foresail was hauled up and her topsails in (10th finding).

The barkentine had no more sail than was needfull to give her steerage way. None of them could have been furled and leave the barkentine manageable with the wind as it was (9th finding).

Capt. Willey testifies that he could not take off any other sails and steer, tack, wear or handle his vessel, that is, have steerage way. He gives the reason why he could not take off or reef the other sails (R., fol., 40).

In the *Rhode Island*, 17 F. R., 554, the three masted schooner, Fisher, at night and in a dense fog, was sailing under her five lower sails at seven miles an hour. She had two jibs and foresail, mainsail and spanker.

Relatively, she had nearly full sail on her, certainly a far greater proportion than the Willey.

The Court (Judge Brown) condemned her not only on this ground but also because she showed no torch.

In the *Colorado*, 91 U. S., 692, the bark was carrying about the same sail as the Willey. The head note says that she had her *foresail and her light sails furled, and was sailing four miles an hour.* The Court held her without fault.

This case is almost analogous to ours, and we call especial attention to the opinion of the Court.

In the *John Hopkins*, 13 F. R., 185, the bark Fury was sailing eight or nine knots at night, and in a dense fog, and was showing no torch, while the steamer was sailing only three and a half knots. The Court condemned the bark on both grounds, too great speed and no torch.

In the *Leland*, 19 F. R., 771, the schooner Porteh was sailing four or five knots and the Court held her without fault.

In the *Elysia*, 4 Asp. M. L. C., 540, the speed of

the schooner was five and a half knots, and this was held moderate speed. The Court said: "It would, however, be very dangerous for a sailing vessel under all circumstances to reduce her speed to anything like three knots, because such a speed would, in certain circumstances, place her entirely out of command.

In the *Zadoc*, 9 Prob. Div., 114, the schooner was sailing at six knots under a press of canvass, while the steamer Iduna was only sailing two to three knots.

In the *Victoria*, 3 W. Rob., 49, the brig was sailing six knots and ran into a vessel at anchor, and was condemned, but this was in a clear night and in an improper channel, the Swin.

In the *Pepperell*, Swabey, 12, the ship knew that she was crossing fishing grounds, could see only 100 to 200 yards, was sailing six and a half knots and knew that fishermen were about, having seen lights. The Court held her speed immoderate.

In the *Westphalia*, 4. Ben., 404, referred to by Marsden in his book on Collisions, p. 166, the brig was condemned, not on account of speed, but because she was not blowing a horn—not as Mr. Marsden intimates, because of her speed.

I find also in the case of the Nacoochee (22 Fed. Rep., 855), decided by Judge Brown, that a small fishing schooner was sailing in a fog four knots. Neither the Court nor counsel deemed this immoderate speed. This view was approved on appeal.

The Nacoochee, 24 Blatch. C. C., 99.

The same is true in the Pennland, 23 Fed. Rep., 551, where the speed of the brig was from four to five knots.

Ninth Point.

The duty to check speed and change direction devolved upon the steamer alone, and the barkentine was bound to hold her course.

The Northern Indiana, 3 Bl. C. C., 99, citing numerous cases.

Without some signal from the steamer under the 19th article, the barkentine could not safely luff, for that would check her headway, nor fall off, because that would bring her nearer to the steamer and she was bound to keep her course.

Captain Willey could have avoided a collision if he had received the proper signals from the steamer of the course which she intended to take.

He was cool, on the alert, heard the foghorn and was watching the steamer, and he is a man whose clear testimony on the witness stand, especially on his cross-examination, impresses the fact of his great coolness and presence of mind.

If the steamer had obeyed the 19th article, there would have been no collision.

Tenth Point.

The decree of the Circuit Court should be affirmed with interest and costs, and with ten per cent. damages for delay under the 23d rule.

Wm. W. Goodrich,
Of Counsel for the Willey.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM, No. 293.

THE BRITISH STEAMER MARTELLO, &c., CHARLES H. WILSON, *et al.*,

Claimants–Appellants,

vs.

ICHABOD WILLEY, *et al.*,

Appellees.

APPENDIX TO BRIEF FOR APPELLEES.

GOODRICH, DEADY & GOODRICH,
Proctors for Appellees.

WILLIAM W. GOODRICH,
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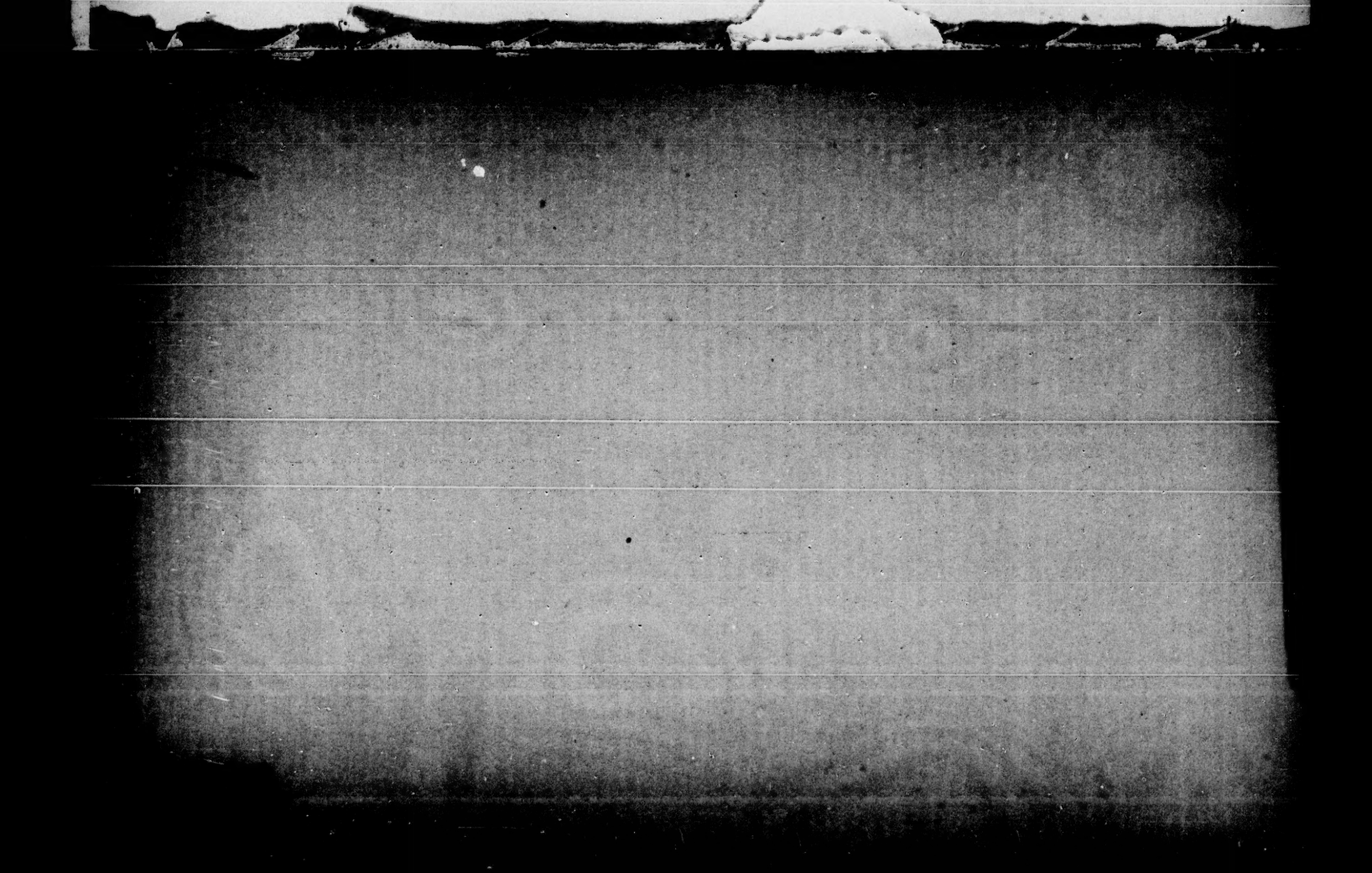

United States Supreme Court,

OCTOBER TERM, 1893.

The British Steamer MARTELLO, etc., CHARLES HENRY WILSON and ARTHUR WILSON, Claimants,

Appellants,

vs.

ICHABOD WILLEY, Libellant,

Appellee.

CHARLES HENRY WILSON and ARTHUR WILSON, Libellants,

Appellants,

vs.

The Barkentine FREDA A. WILLEY, etc., WILLIAM H. PARSONS *et al.*, Claimants,

Appellees.

Appendix to Brief for the Freda A. Willey.

Following the classifications stated under the First Point of our Brief, we can divide the exceptions of the Martello into four classes:

Class 1. Exceptions to findings of facts in dispute.

Class 2. Exceptions to a refusal to find immaterial facts.

Class 3. Exceptions to a refusal to find evidence instead of facts.

Class 4. Exceptions to a refusal to find conclusions of law based on rejected findings of fact.

In the light of this classification we shall consider the one hundred and forty-two exceptions of the Martello :

First Exception :

"They hereby except to so much of the third finding of fact as found by the Judge herein, as finds that "The Martello got under way from Gravesend Bay about 6 A. M. Sunday, May 8th, 1887."

This exception falls under Class 1 and Class 3.

The ultimate fact to be found is the speed of the Martello, and all the evidence introduced as to the time of the raising of her anchor in Gravesend Bay, her passing the entrance buoy, her reaching the point of collision, and fixing the point of collision, are important simply as fixing the speed of the Martello. The speed is the ultimate fact. The data from which the speed is reckoned are evidence.

So far as the matter is in dispute, the memorandum of Maider (R., fol. 13) shows that the vessel started slow ahead at 6:07 A. M.

Second Exception :

"They further except to so much of the fourth finding of fact as found by said Judge, as finds that the engines were at 7:10 moved ahead."

Classes 1 and 3.

This relates to the time when the pilot was discharged. See memo. of Maider (R., fol. 13), where it is stated as follows: "Stopped to discharge pilot, 7:03 ; slow ahead, 7:10 A. M."

Third Exception:

"They further except to so much of the fifth finding of fact as found by said Judge as finds that about forty minutes after discharging the pilot the horn of a sailing vessel was heard."

The same memo. shows that the steamer was put full speed astern at 7:50, just 40 minutes from slow ahead at 7:10. It may be noticed also that the engineer's log repeats this time, as also the times referred to in the previous exceptions. "Moved engines slow ahead at 7:10 A. M. * * * full astern at 7:50" (fol. 30). Capt. Jenkins states that he heard the foghorn at 7:55 (R., fol. 16).

Fourth Exception:

"They further except to so much of the sixth finding of fact as finds that vessels could not be seen more than a quarter of a mile away."

Class 1.

Ludvigsen (R., fol. 19), says a ship could be seen about a quarter of a mile.

Billington (fol. 17), says that the fog was so dense that he could see but a very short distance.

Ogden (fol. 17), says that a buoy could be seen from 150 to 300 yards.

Wolff (fol. 18), says that he had seen thicker fogs, but you might see a vessel a couple of lengths, or 600 or 800 feet.

Willey (fol. 19), says that he could see a vessel a quarter of a mile distant.

Burns (fol. 20), says that a vessel could be seen about 400 yards off.

Fifth Exception:

"They further except to so much of the 6th finding of fact as finds that the speed of the Martello was about 5 1/2 to 6 knots an hour."

Class 1.

Under Point Five of my brief I have discussed the speed of the vessel, basing it upon the evidence furnished by the steamer itself.

The following are the data which the Circuit Judge had before him:

Frates (R., fol. 32) states the steamer's speed to be be six or seven knots.

Green (R., fol. 33), about eight knots.

Willey (fol. 33), six or seven knots.

Crowell (fol. 33), seven or eight knots.

Spencer (fol. 34), between six and seven knots.

Martin (fol. 34), at least six knots.

Kennedy (fol. 34), about seven knots.

Sixth Exception:

"They further except to so much of the 6th finding of fact as found by the said Judge that three knots an hour would give the Martello good steerage way."

Class 1.

Jenkins, master of the steamer (R., fol. 21), testified that the steamer should have two and a half to three knots speed in order to have steerage.

Seventh Exception:

"They further except to so much of the 7th finding of fact as finds that the Freda A. Willey loomed in sight a minute or two after the hearing of the horn."

Class 1.

Ogden (R., fol. 36), says: "It must have been a minute from the time I heard the horn until I saw the barkentine."

Tucker (fol. 36) says: "It was about a minute."

Eighth Exception:

"They further except to so much of the eighth finding of fact as finds that the barkentine Freda A. Willey was bound into the harbor of New York."

Class 2.

This exception is so frivolous that it is not worth while to notice it. The testimony is undoubted as to the course of the Willey before and at the time of the accident; but see fol. 37.

Ninth Exception:

"They further except to the ninth finding of fact and to each and every part thereof. The ninth finding is as follows: 'The Willey, with all her sails set, can make ten knots an hour; with the wind, as found in the sixth finding, the Willey, if going at less than four knots an hour would not have steerage way sufficient to give her master thorough control of her to tack, wear, or manage her, as occasion might require."

Class 1.

Willey (R., fols. 40, 41, and 88). "The Willey is a good ten knot vessel loaded, and I could not have taken off any more sail and been able to handle her."

Tenth Exception:

"They further except to so much of the tenth finding of fact as finds that at 7 A. M. the wind, freshening up, her foresail (the barkentine's) was hauled up."

Class 1.

Willey (R., fol. 39). "I hauled up the foresail at seven o'clock in the morning."

Ludvigsen (fol. 44), who describes the sails which were set at the moment of collision.

Cobb (fol. 44), who enumerates the sails which were not set at the collision.

Eleventh Exception:

"They further except to so much of the eleventh finding of fact as finds that the barkentine was sounding her horn at intervals of one or two minutes."

Class 1.

Cobb (fol. 45). "The horn was blown every minute and a half or two minutes."

Ludvigsen (fol. 46). "The captain was blowing the horn at intervals of a couple of minutes."

Mathlin (fol. 46). "The captain was blowing the foghorn every minute."

Willey (fol. 46). "The horn was sounded at intervals not exceeding two minutes."

Eleventh (*a*) Exception:

"They further except to so much of the eleventh finding of fact as finds that the Willey was sailing closehauled."

Class 1.

Willey (fol. 40). The barkentine was sailing closehauled on the starboard tack.

Twelfth Exception:

"They further except to so much of the seventh finding of fact as finds that the barkentine was making about four knots an hour."

Class 1.

Ichabod Willey, at fol. 50:

"Q. What time did you take your last observation of the log? A. At four o'clock in the morning.

Q. Did you notice after that how the vessel was sailing—her speed? A. No, sir; not until the collision, then I had sixteen miles on the log after the collision. I only know what she made for the four hours.

Q. Between four o'clock in the morning and the time of the collision you made sixteen knots? A. Sixteen miles; yes, sir.

Q. You mean nautical miles? A. Yes, sir; nautical miles, that is what we call them, knots.

Q. Did the vessel make more speed before you took off some of the sails at seven o'clock than she did before that? A. I should say there wouldn't be much difference. As the wind increased a little

I took sails off. We appeared to be making the same right along."

Thirteenth Exception:

"They further except to so much of the twelfth finding of fact as finds that the barkentine answered the steamer's whistle promptly each time with a single blast of her horn."

Class 1.

Willey (fol. 51): He took the horn and sounded it—heard another whistle, sounded again, heard a third whistle, and sounded again, waited two or three seconds for the sound of the steamer's whistle to die out.

Thirteenth (A) Exception:

"They further except to so much of the twelfth finding of fact as finds that 'The Martello appeared in sight a quarter of a mile away.'"

Class 1.

Willey (fol. 53): She was a quarter of a mile away from us, about.

Cobb (fol. 53): At first sight the steamer was a quarter of a mile away.

Fourteenth Exception:

"They further except to so much of the the fourteenth finding of fact as finds that 'The speed of the Martello at the time of the collision was about two knots an hour.'"

Class 1.

Billington (fol. 54): "Q. How fast do you think your vessel was going when you struck him? A. That is hard to say. Q. The engines were going astern, you say, previous to that? A. Yes. Q. Then how fast do you think you were going? A. If the engines had gone astern when the telegraph rang we might have had a little more than way; two and one-half to three miles; two to two and a half, I think."

Fifteenth Exception:

"They further except to the fifteenth finding of fact, and to each and every part thereof."

The fifteenth finding is as follows: "The place of collision was about one and three-quarter miles, about N. by E. from Sandy Hook Lightship."

Class 1.

Willey (R., fols. 55, 56 and 57): The barkentine passed Sandy Hook Lightship to the eastward from a mile and a quarter to a mile and a half. The collision took place about a mile and a half northeast of Sandy Hook Lightship.

Sixteenth Exception:

"They further except to so much of the sixteenth finding of fact as finds that the call of the first officer of the Martello to the barkentine to luff was not heard by those on the barkentine."

Class 1.

Burns (fol. 59). Heard no hail from the steamer, nor any noise aboard of her.

Seventeenth Exception:

"They further except to so much of the seventeenth finding of fact as finds that 'from the time of the hearing of the first whistle down to the time of the collision, the steamer, except as stated in the sixteenth finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines,' and that in consequence the Willey held her course, as she was bound to do, but the steamer ran into her with great violence."

Class 1.

The evidence in support of this is too long to be quoted at this point, but for a complete explanation by Captain Willey, see fols. 60–67, which is a very clear argument in favor of the nineteenth rule.

Eighteenth Exception:

"They further except to the eighteenth finding of fact and to each and every part thereof." The eighteenth finding was as follows: "Had the steamer been going at three knots an hour, and had she stopped her engines as soon as she heard the Willey's horn and reversed when she sighted the barkentine, she would have stopped out of the Willey's course."

Class 1.

Under the fifth exception, testimony is cited to show that the Martello was going about five and a half to six knots. By the usual formula, a vessel going at five and a half to six knots an hour, traverses five hundred and fifty to six hundred feet per minute, and a vessel going at the rate of three knots an hour, in the same time traverses three hundred feet per minute. It is evident that the barkentine, going at the rate of four knots an hour, would have traversed four hundred feet while the steamer was traversing five hundred and fifty feet. If the steamer, therefore, had been going only at the rate of three knots an hour, that is, three hundred feet per minute, the barkentine would have crossed her bow more than her length, which is one hundred and forty feet.

See also Willey (fol. 66). If he had changed it (his direction), one hundred and forty feet, he would have cleared me—that is, on a port wheel. He struck me forward, and one hundred and fofty feet more would have put him astern of me.

Nineteenth Exception:

"They further except to so much of the nineteenth finding of fact as finds that the master of the barkentine had his vessel under control."

Class 1.

Captain Willey describes the sails that he had set at fol. 38. At fol. 41 he says: "Q. Was it

possible for you to have taken any sail off your vessel between 7 and 8 and have steerage way? A. No, not and handle my vessel. Q. When you heard the whistle of the steamer Martello, why did you not take off some of your sail? A. Because I had not any more than I needed to handle the vessel. I couldn't handle her with less."

Twentieth Exception:

"They further except to so much of the nineteenth finding of fact as finds that 'if, when the steamer first sighted the barkentine the master of the latter had been advised that the steamer was starboarding her wheel, he could have ported and avoided the collision.'"

Class 1.

Willey (R., fol. 62): If the steamer had, by whistle, notified the bark of either porting or starboarding, the barkentine could have avoided the collision.

Twenty-first Exception:

"They further except to so much of the nineteenth finding of fact as finds that if, when the steamer first sighted the barkentine the master of the barkentine had been advised that the steamer was reversing he could have ported and avoided the collision.

Class 1.

See the testimony cited above under the seventeenth exception (fols. 60–67).

Twenty-second Exception:

"They further except to the first conclusion of law as found by the Judge herein, and to each and every part thereof."

This is a proper matter for argument, being an exception to a conclusion of law.

Twenty-third Exception:

"They further except to the second conclusion of law as found by the Judge herein, and to each and every part thereof.

Same as last exception.

Twenty-fourth Exception:

"They further except to the third conclusion of law as found by the Judge herein, and to each and every part thereof.

Same as twenty-second exception.

Twenty-fifth Exception:

"They except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find as requested, that 'the Martello raised anchor at 5:30 A. M., Sunday, May 8th, 1887, and started for sea.'"

Class 1 and class 3.

See Maider's log (fol. 13).

Twenty-five (A) Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the Martello reached the Station Boat and discharged her pilot at about 7:50 A. M.

Classes 1 and 3.

See fol. 30, where the engine log says, "then stopped to discharge pilot; moved engines slow ahead at 7:10 A. M."

Twenty-sixth Exception:

"They further except to the ruling and decision of the Judge on the trial, for that he failed and refused to find, as requested, that 'the point where the Martello discharged the pilot is about five hundred to six hundred feet easterly of the Black Buoy.'"

Class 1 and Class 3.

See remarks under first exception.
See also fol. 22.

Twenty-seventh Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the point where the Martello discharged the pilot is the usual point for discharging pilots.

Class 2 and Class 3.

It is utterly immaterial whether the places was the usual place or not.

Twenty-eighth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the steamer did not stop altogether to discharge the pilot, but slowed down to a speed of about a knot an hour."

Classes 2 and 3.

This is of no importance whatever. But see R., fol. 29.

Twenty-ninth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that after discharging the pilot the Martello started ahead at about twenty-eight revolutions of the propeller."

Class 3.

This is a request to find evidence.

Thirtieth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that after discharging the pilot the Martello started ahead at a speed of about three and a half to four knots an hour."

Class 2.

This is a request to find evidence.

Thirty-first Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that at 7:20 the master of the Martello sent word to the engineer to go as slow as possible."

Class 2.

This is a request to find evidence.

Thirty-second Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the engines of the Martello were, about 7:20 A. M., reduced to twenty-four revolutions."

Class 2.

This is a request to find evidence.

Thirty-third Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the speed of the Martello was, about 7:20, reduced to about three or three and a half knots per hour."

Classes 1 and 2.

This is a request to find evidence, and is in dispute.

Thirty-fourth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the speed of the Martello was as low as possible consistent with good steerage-way."

Class 1.

This is in dispute. It has already been testified, and the Court has found that the speed of the Martello was from five and half to six knots an hour,

and the Court has also found that three knots would give her steerage way.

See testimony cited under fifth and sixth exceptions.

Thirty-fifth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that at from twenty-two to twenty-three revolutions the engine would not have turned the wheel over."

Classes 2 and 3.

This is a request to find evidence.

Thirty-sixth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that at about 7:50 A. M. the horn of the sailing vessel was heard on the starboard bow."

Class 3. This is found by fifth finding.

See testimony cited under third exception.

Thirty-seventh Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that almost simultaneously with the hearing of the horn the barkentine loomed in sight."

Class 1.

Ogden, at fol. 36, testified as follows:

Q. How long was it from the time you heard the foghorn until the time you saw the barkentine? A. Must have been a minute, sir; about a minute from the time I heard the horn until I saw the barkentine.

Thirty-eighth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed

and refused to find, as requested, that the place of collision was about two miles to the northward of the Scotland Lightship."

Class 1.

See testimony under fifteenth exception.

Thirty-ninth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find the ninth finding of fact on behalf of the Martello, as requested." The ninth finding was as follows: "Those on board the Willey heard the fog whistle of the Martello at least three times previous to seeing the steamer, and were thereby warned of the steamer's proximity."

Class 2.

This is entirely immaterial. In addition to that, the Court found in the twelfth finding of fact that those on board the Willey heard three times the steamer's whistle.

Fortieth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the barkentine, when sighted by the Martello, had all her sails set, excepting the fore-royal and the main and mizzen gaff topsails."

Class 1.

See the testimony under the tenth exception.

Forty-first Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the barkentine, when sighted by the Martello, was proceeding at the rate of about five knots an hour."

Class 1.

See testimony under twelfth exception.

Forty-second Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that no attention was paid by those on the barkentine to the request of the first mate of the Martello to 'luff, luff all you can.'"

Class 2.

The immateriality of this exception is shown by the fact that it is testified, uncontradicted, that the hail was not heard aboard of the Willey. See Burns, fol. 59.

Forty-third Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that no measures whatever were taken at any time by those on the barkentine to avert the collision."

Class 2.

This becomes immaterial, in view of the fact, as found, that the Martello gave no indications to the Willey as to whether she was porting, starboarding or reversing. Under these circumstances the Willey should hold her course. See Willey, fols. 60–67.

Forty-fourth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the speed of the Martello at the time of the collision was not above a knot an hour."

Class 1.

See citations under Exception 14.

Forty-fifth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed

and refused to find, as requested, that the speed of the Martello in the fog was moderate."

Class 1.

See testimony under fifth and sixth exceptions.

Forty-fifth (A) Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the lookout of the Martello was competent and thorough."

Class 2.

The frivolity of this exception is shown by the fact that the Court had already found this fact in the fifth finding.

Forty-sixth Exception:

"They further except to the ruling and decision of the judge on the trial herein, for that he failed and refused—as requested, that those in charge of the Martello, did all in their power to avert the threatened collision."

Class 1.

This is intended as a drag net and is compounded of various elements, namely: of speed and manœuvering at the time of the collision. See testimony under first, fifth and sixth exceptions; see also fols. 60-67.

Forty-seventh Exception:

"The further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the speed of the Willey in the fog was immoderate and excessive."

Class 1.

See testimony under ninth and twelfth exceptions.

Forty-eighth Exception:

"They further except to the ruling and decision

of the Judge on the trial herein, for that he failed and refused to find, as requested, that the barkentine was negligently and improperly handled when the collision was impending."

Class 1.

This is in dispute. See testimony, fols. 60–67.

Forty-ninth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the collision was caused by the negligent and improper navigation of the barkentine in running at too high a rate of speed in a fog."

Class 1.

See citations under ninth and twelfth exceptions.

Fiftieth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the collision was caused by the negligent and improper navigation of the barkentine in paying no attention to the fog-whistle of the Martello."

Class 1.

See fols. 60–67.

Fifty-first Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as requested, that the collision was caused by the negligent and improper navigation of the barkentine in taking no measures to avoid a collision after the Martello was seen and the danger of collision was imminent and apparent."

Class 1.

See fols. 60–67.

Fifty-second Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find the first conclusion of law on behalf of the Martello, as requested."

Class 4.

Fifty-third Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find as a conclusion of law, as requested, that the Freda A. Willey was at fault."

Class 4.

Fifty fourth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find as a conclusion of law, as requested, that the collision was occasioned by the negligent and improper navigation of the barkentine."

Class 4.

Fifty-fifth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find as a conclusion of law, as requested, that the collision was caused by the barkentine's neglect of proper precautions."

Class 4.

Fifty-sixth Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find, as a conclusion of law, as requested, that the collision was occasioned by the failure of the barkentine to take any measures whatever to avert it."

Class 4.

Fifty-seventh Exception:

"They further except to the ruling and decision of the Judge on the trial herein, for that he failed and refused to find the third conclusion of law on behalf of the Martello, as requested."

Class 4.

Fifty-eighth Exception:

"They except to the failure and refusal of the Judge to find the additional finding of fact numbered 17, as requested." It is as follows: "Orders had been given for steam at six o'clock on the morning of May 8, but at 5:30 A. M., Pilot Henderson, finding that steam was already up, gave orders to raise the anchor at once, and thereupon started for sea."

Classes 1 and 3.

This is a request to find evidence. It is also in dispute. See testimony under first exception.

Fifty-ninth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 18, as requested." It is as follows: "The Martello discharged her pilot at the usual point where pilots are discharged from outgoing steamers."

Classes 2 and 3.

Sixtieth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact, numbered 19, as requested." It is as follows: "The usual point for discharging pilots from outgoing steamers is about five hundred to six hundred yards easterly from the Black Buoy No. 1."

Classes 1, 2 and 3.

Sixty-first Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 20, as requested." It is as follows: "The Martello did not entirely stop in the water to discharge the pilot, but only diminished her speed for that purpose."

Classes 1, 2 and 3.

Sixty-second Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 21, as requested." It is as follows: "The method of communication between the bridge and the engine room on the Martello was the Chadbourne dial. On this dial the signals for speed are 'Stop,' 'Stand by,' 'Slow ahead,' 'Half speed ahead, 'Full speed.' "

Classes 2 and 3.

This is utterly immaterial.

Sixty-third Exception:

"They further except to the failure and refusal of said Judge to find the additional finding of fact numbered 22, as requested." The twenty-second additional finding is as follows: "The signal, 'Slow ahead,' on the dial, indicated the rate of speed produced by the engines when working at twenty-eight revolutions per minute."

Classes 2 and 3.

Sixty-fourth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 23, as requested," The 23d additional finding of fact is as follows: "The best speed of the Martello is between twelve and thirteen knots, the engines working between fifty-eight and fifty-nine revolutions per minute."

Class 2.

Sixty-fourth (A) Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 24, as requested." The 24th additional finding of fact is as follows: "The speed of the Martello with her engines working at twenty-eight revolutions per minute, would not be more than five knots per hour."

Classes 2 and 3.

This is immaterial, in view of the fact that the Court found her speed was five and a half to six knots at the time of the collision.

Sixty-fourth (B) Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 25," as requested." The 25th additional finding of fact is as follows: "Five knots per hour, under the circumstances, would not be an immoderate speed for the Martello."

Class 1.

See testimony under fifth and sixth exceptions.

Sixty-fifth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 26, as requested." The 26th additional finding of fact is as follows: "The Martello at the instant of sighting the barkentine was proceeding slowly ahead, the engines working at about twenty-four revolutions per minute."

Class 1 and Class 3.

This is in dipute. See testimony under fifth and sixth exceptions.

Sixty-sixth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 27, as requested." The 27th addi-

tional finding of fact is as follows: "The lowest speed at which the engines could be worked to give the Martello good steerage way was twenty-four revolutions per minute."

Class 2.

This is entirely immaterial. The point is, what speed was she making, not how few revolutions her engines would make.

Sixty-seventh Exception:

They further except to the failure and refusal of said Judge to find the additional finding of fact number 28, as requested." The 28th additional finding of fact is as follows: "The speed of the Martello, with her engines working at twenty-four revolutions per minute, would not be more than four knots per hour."

Class 2.

This is immaterial. The question is, what speed was she making at the time of the collision, and what was steerage way for her? See testimony under fifth and sixth exceptions.

Sixty-eighth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 29, as requested. "The 29th additional finding of fact is as follows: "A speed of four knots per hour under the circumstances would be a moderate speed for the Martello."

Classes 1 and 2.

See testimony under fifth and sixth exceptions.

Sixty-ninth Exceptions:

"They further except to the failure and refusal of the said judge to find the additional finding of fact numbered thirty-three, as requested." The 33d additional finding of fact is as follows: "The speed of the Willey under the sail she carried, and

with a five or six knot breeze blowing, was more than four knots per hour."

Class 1.

See testimony cited under twelfth exception.

Seventieth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 34, as requested." The 34th additional finding of fact is as follows : "The speed of the Willey under the sail she carried, and with a five or six knot breeze, was not less than five knots an hour."

Class 1.

See citations under ninth and twelfth exceptions.

Seventy-first Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 36, as requested." The 36th additional finding of fact is as follows : "Any reduction of canvas made on the Willey was not to diminish her speed, but only to avoid increase of speed."

Class 2.

A more immaterial fact could not well be found.

Seventy-second Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 37, as requested." The 37th additional finding of fact is as follows : "The amount of canvas carried by the Willey was more than sufficient for good steerage way."

Class 1.

See testimony cited under the ninth and twelfth exceptions.

Seventy-third Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 38, as requested." The 38th additional finding of fact is as follows : "There is no competent evidence that a speed of four knots an hour was necessary for proper steerage way."

Class 2.

A more frivolous request could hardly be made.

Seventy-fourth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 39, as requested." The 39th additional finding of fact is as follows: "The only testimony as to the rate of speed necessary for steerage way was that of her captain—the libellant Willey."

Class 2.

This request is childish.

Seventy-fifth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 40, as requested." The 40th additional finding of fact is as follows: "The uncorroborated evidence of the captain of the barkentine was and is insufficient to establish the rate of speed necessary for the proper steerage way of the barkentine."

Class 2.

This is also immaterial enough to be childish.

Seventy-sixth Exception :

"They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 41, as requested." The 41st additional finding of fact is as as follows: "A speed of

four knots an hour was more than sufficient for proper steerage way on the barkentine."

Class 1.

See testimony under ninth exception.

Seventy-seventh Exception:

"They further except to the failure and refusal of the said judge to find the additional finding of fact numbered 42, as requested." The 42d additional finding of fact is as follows: "The point of collision was about two miles northward of the Sandy Hook Lightship."

Class 1.

See testimony under the fifteenth exception.

Seventy-eighth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 43, as requested." The 43d additional finding of fact is as follows: "The Willey, at the time of and for some time previous to the collision was directly across the line of outgoing European steamers."

Classes 2 and 3.

Such a request is absurd.

Seventy-ninth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 45, as requested." The 45th additional finding is as follows; "The position of the barkentine required greater care and caution in her navigation than would be necessary on the open sea, where other vessels were not to be specially looked for."

Class 2.

Eightieth Exception:

"They further except to the failure and refusal

of the said Judge to find the additional finding of fact numbered 46, as requested." The 46th additional finding of fact is as follows: "A speed of four knots an hour for a sailing vessel approaching New York Harbor in a thick fog and directly in the line of outgoing steamers is immoderate speed."

Class 1.

See testimony under ninth exception.

Eighty-first Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 47, as requested." The 47th additional finding of fact is as follows: "The prudent course for the navigation of the Willey under the circumstances would have been—northwesterly one, she not being confined to any channel and wind free."

Class 2.

This is too absurd to comment upon.

Eighty-second Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 49, as requested." The 49th additional finding of fact is as follows: "The rule 19 being optional, no fault or consequence attaches to a vessel which does not avail itself of these signals."

Class 2.

Eighty-third Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 50, as requested." The fiftieth additional finding of fact is as follows: "It is fault in a sailing vessel, in danger of colliding with a steamer, to wait for the signals under rule 19, and take no measures to avert the threatened danger."

Class 2.

This is immaterial.

Eighty-fourth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 52, as requested." The fifty-second additional finding of fact is as follows: "The master of the barkentine was advised of the position and probable course of the Martello, and the possible danger to his own vessel, from five to ten minutes prior to the collision."

Classes 1 and 3.

Fifty-eighth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 53, as requested." The fifty-third additional finding of fact is as follows: "If the master of the Willey, on seeing the danger, had luffed immediately, the collision would have been averted."

Class 1.

See fols. 60–67.

Eighty-sixth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 50, as requested." The 54th additional finding of fact is as follows: "Such a manœuvre on the part of the barkentine was excusable."

Class 1 and Class 2.

See fols. 60–67, inclusive.

Eighty-seventh Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 55, as requested." The 55th additional finding of fact is as follows: "Such a manœuvre on the part of the barkentine, if unavail-

ing to avert entirely the collision, would not have increased the resulting damage."

Class 1 and Class 2.

See testimony, fols. 60–67, inclusive.

Eighty-eighth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 57, as requested." The 57th additional finding of fact is as follows: "It was the duty of the master of the barkentine, upon the approach of danger, to call all hands on deck, in order that any measures necessary for preventing a collision might be promptly carried out."

Classes 1 and 2.

See fols. 60–67, inclusive.

Eighty-ninth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 58, as requested." The fifty-eighth additional finding of fact is as follows: "The portion of the crew on deck at the time the Martello hove in sight was insufficient to carry out promptly the measures necessary for preventing a collision."

Classes 1 and 2.

See fols. 60–67, inclusive.

Ninetieth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 59, as requested." The fifty-ninth additional finding of fact is as follows: "The master of the barkentine took no measures whatever to avert the collision or lessen its force."

Classes 1 and 2.

See fols. 60–67.

Ninety-first Exception:

"They further except to the failure and refusal

of the said Judge to find the additional finding of fact numbered 60, as requested." The sixtieth finding of fact is as follows: "The master of the barkentine, instead of taking measures to avert the collision, waited for the steamer to give the optional signals under Rule 19."

Class 1.

See fols. 60–67.

Ninety-second Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 61, as requested." The 61st additional finding of fact is as follows: "The master of the barkentine, even when the danger was imminent, took no measures to avert it."

Class 1.

See fols. 60–67.

Ninety-third Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 62, as requested." The 62d finding of fact is as follows: "The inaction of those on board the barkentine contributed to the collision."

Class 1.

See fols. 60–67.

Ninety-fourth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 63, as requested." The 63d additional finding of fact is as follows: "When the two vessels sighted each other the steamer was helpless for avoiding the collision, but the reverse was the case with the barkentine."

Classes 1 and 2.

See fols. 60–67.

Ninety-fifth Exception :

" They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 64, as requested." The 64th additional finding of fact is as follows : " The speed of the Martello at the instant of collision, under a hard-a-port helm, and with her engines reversed at full speed, was not greater than one knot per hour."

Class 1.

See testimony under fourteenth exception.

Ninety-sixth Exception :

" They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 65, as requested." The 65th additional finding of fact is as follows : " There was no reduction of speed nor any measure taken to reduce speed on the part of the barkentine, or to check her headway."

Classes 1 and 2.

See also fols. 60–67.

Ninety-seventh Exception :

" They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 66, as requested." The 66th additional finding of fact is as follows : " A speed of one knot per hour on the part of the steamer was sufficient to cause the damage to the barkentine."

Class 2.

See testimony under fourteenth exception.

Ninety-eighth Exception :

" They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 67, as requested." The 67th additional finding of fact is as follows : " The damage to the barkentine was not greater than could be caused

under the circumstances by a speed on the part of the steamer of one knot per hour."

Class 2.

See testimony under fourteenth exception.

Ninety-ninth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 68, as requested." The 68th additional finding of fact is as follows: "The steamer, with a speed of two knots per hour, at the instant of collision, would probably have caused much greater damage to the barkentine."

Class 2.

See testimony under fourteenth exception.

One hundredth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 69, as requested." The 69th additional finding of fact is as follows: "If the barkentine had been sailing at a moderate rate of speed, the collision would not have occurred."

Class 1.

See testimony under ninth exception.

One hundred and first Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact, numbered 70, as requested." The 70th additional finding of fact is as follows: "The master of the barkentine having due regard to the danger of collision, which was immediate and imminent, was not under an inflexible obligation to hold his course, but was bound to use such measures as, with regard to the special circumstances of the case, were necessary to avoid collision."

Class 2.

See fols. 60–67.

One hundred and second Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 71, as requested." The 71st additional finding of fact is as follows: "The barkentine contributed to the collision by proceeding in a thick fog across the line of outward bound European steamers at an immoderate rate of speed; by neglecting to properly blow her horn, and by waiting for the optional signals under Rule 19, instead of taking measures at once to avert the collision."

Class 1.

See fols. 60–67.

See testimony cited under ninth exception above.

One hundred and third to One hundred and twelfth Exceptions:

These are the exceptions to the failure to find facts, as requested in the additional findings numbered 72 to 81, on page 88 of the Record. All of these are requests to find evidence.

One hundred and thirteenth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 82, as requested." The 82d additional finding of fact is as follows: "The barkentine loomed in sight of those on the steamer almost simultaneously with hearing the horn."

Class 1.

See testimony under seventh exception above.

One hundred and fourteenth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 83, as requested." The 83d additional finding of fact is as follows: "Five knots an hour would be improper, excessive and immoderate speed for the barkentine in the fog."

Class 1.

See testimony cited under the ninth exception.

One hundred and fifteenth Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 84, as requested." The 84th additional finding of fact is as follows : "Five and one-fourth knots an hour would be improper, immoderate and excessive speed for the barkentine in a fog."

Class 1.

See citations under last exception.

One hundred and sixteenth to one hundred and twenty-second Exceptions, inclusive :

These are exceptions to the refusals to find facts stated at page 89 of the Record, these facts being that the day of the collision was Saturday, and that many vessels were eastward bound to Europe, and that the Martello was in their track.

All of these requests are requests to find facts, and they are also immaterial.

One hundred and twenty-third Exception :

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 92, as requested." The ninety-second additional finding of fact is as follows : "Article 24 of the international rules and regulations for preventing collision at sea is as follows :

'Nothing in these rules shall exonerate any ship or owner, or master, or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.'"

The refusal of the Court to find this was doubtless on the ground of its immateriality. The regulations speak for themselves, and it is absurd to put them into a finding, as requested here.

One hundred and twenty-fourth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 93, as requested." The ninety-third additional finding of fact is as follows: "The speed of the Martello in the fog was moderate."

Class 1.

See my argument in the brief, as to the speed.

One hundred and twenty-fifth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 94, as requested." The 94th additional finding of fact is as follows: "From 4 o'clock in the morning in the morning until the collision there was little difference in the Willey's speed. She made about the same right along."

Classes 2 and 3.

This has already practically been found by the Court. See ninth finding of fact, page 81.

One hundred and twenty-sixth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 95, as requested." The 95th additional finding of fact is as follows: "The collision was caused or contributed to by the negligence and improper navigation of the Willey in taking no measures to avoid collision when danger was at hand."

Class 1.

See fols. 60–67.

One hundred and twenty-seventh Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 96, as requested." The 96th additional finding of fact is as follows: "The Mar-

tello, after discharging the pilot, proceeded on her voyage E. by S."

Classes 2 and 3.

One hundred and twenty-eighth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 97, as requested." The 97th additional finding of fact is as follows: "The collision occurred about two miles northward of the Sandy Hook Lightship."

Classes 1, 2 and 3.

This is the same request as that to which the 79th exception was made. See same.

See also testimony under 15th Exception.

One hundred and twenty-ninth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 98, as requested." The 98th additional finding of fact is as follows: "If the Willey had luffed, the collision might have been avoided."

Class 1.

See fols. 60–67.

One hundred and thirtieth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 99, as requested." The 99th additional finding of fact is as follows: "The rule 19 being optional, no fault or consequence attaches to a vessel on account of not making the signals thereunder."

Class 2.

This is clearly immaterial.

One hundred and thirty-first Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of

fact numbered 100, as requested." The 100th additional finding of fact is as follows: "The Willey should have luffed irrespective of whether the whistles under rule 19 were given or not."

Class 1.

See fols. 60–67.

One hundred and thirty-second Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 101, as requested." The 101st additional finding of fact is as follows: "The Willey stood on one course right north from 4 o'clock A. M. right on."

Classes 2 and 3.

This is already found. See finding 11, page 82.

One hundred and thirty-third Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 102, as requested." The 102d additional finding of fact is as follows: "The collision took place north from Sandy Hook Lightship."

Class 1.

See testimony under exception fifteen, above.

One hundred and thirty-fourth Exception:

"They further except to the failure and refusal of the said Judge to find the additional finding of fact numbered 103, as requested." The 103d additional finding of fact is as follows: "The collision took place two miles distant from the Sandy Hook Lightship."

Class 1.

See testimony cited under last exception.

One hundred and thirty-fifth Exception:

"They further except to the failure and refusal

of the said Judge to find the additional conclusion of law numbered 104, as requested."

This number 104 is evidently a misprint for conclusion of law number 4, found on page 90 of the brief, namely: "The Willey was in fault."

This comes within class 4.

One hundred and thirty-sixth to One hundred and forty-first Exceptions, inclusive:

These are directed to the refusal of the Court to find the previous additional findings from 72 to 103, and to the memorandam endorsed by the Court upon the findings. That memorandum will be found at fol. 158, and the exceptions are childish.

One hundred and forty-second Exception:

"They further except to the failure and refusal of the said Judge to find the additional conclusion of law, numbered 5, that 'The Willey was in fault for not having and using a horn sounded by mechanical means, as required by Article 12 of the International Rules for Preventing Collisions at Sea,' as requested."

This is an exception which comes within the category of exceptions to a refusal of the Court to find a conclusion of law upon admitted facts, and is a proper subject of argument.